Petition

Supreme Court, U.S.
FILED
APR 2 1982

81-1827
No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

THE E. W. SCRIPPS COMPANY
Petitioner,

v.

BERNARD J. HEHEMAN, *et al.*
Respondents.

PETITION OF THE E. W. SCRIPPS COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in ignoring provisions of the National Labor Relations Act and decisions of the Supreme Court and Courts of Appeals by holding, contrary to the Act and such decisions, that a court can and should establish the terms of successive collective bargaining agreements for an indefinite future period when the collective bargaining relationship between the company and the union has terminated?

2. Did the Court of Appeals, in fashioning federal labor law, err in failing to consider the policies and objectives of the Newspaper Preservation Act, thereby needlessly undermining the policies and objectives of the Newspaper Preservation Act?

3. Did the Court of Appeals err in deciding contrary to federal labor law and decisions of the Supreme Court and Courts of Appeals that employment opportunities for production employees survive the termination of the production operations of a failing newspaper?

PARTIES TO THE PROCEEDING

Respondents in addition to Bernard J. Heheman are listed below. Petitioner, The E. W. Scripps Company, is a closely held Ohio corporation with a number of subsidiaries, all of which are wholly owned or closely held, except for the publicly held Scripps-Howard Broadcasting Company.

Robert Altrock, Robert Berning, Paul Blank, Archie Bolton, Joe Boston, Richard Breitfelder, Louis Breitenbach, Ralph Broerman, Jim Canter, Arnold Cantor, Fred Carter, Richard Chrisman, H. Combs, Harold E. Cossens, Ralph Crain, Virgil B. Crocker, Dale Davis, Matt Dolwig, Charles Duncan, John B. Eckstein, H. Edmondson, Glen Enzweiler, Thomas Ernst, Robert L. Feldman, E. Gilb, Frank Godfrey, Elmer Grau, Wm. W. Griffiths, James Gurriere, Dave Harmon, W. Harper, Thomas Hart, Mike Hensley, Charles Herman, Jerry Hinds, Ray Hoendorf, Jim Hoerlein, L. J. Holste, L. Holthaus, John L. Hub, Ray Hughes, D. Imbronyev, G. Inabnit, R. Inabnit, Duane Johnson, F. Kemble, Mike Kirk, William E. Kitchen, Raymond Knox, William Land, Larry Lang, Jr., B. Lawson, Francis J. Lear, Wm. Leary, Earl Lewis, Tom Linneman, Robert Ludwig, Al Maschmeyer, Ron Maxstadt, C. McCarthy, John Mendell, Tom Mendell, Joe Miller, Tommie Morgan, Orville Mueller, Wm. Murphy, Leonard Murray, Ken Myrick, Geo. W. Niles, Norb Ottke, Ralph A. Parker, Jr., P. Ponder, Charles Rahe, John Riehemann, Bernard Riesenberg, Ron Risch, Roy Rose, John Schlinkert, Ralph Schneider, William Schneider, Harold Schreck, E. Schroeder, Louis Schubert, H. Schuler, Ray Schwierjohann, Tom Schwierjohann, Richard Schwing, D. Scott, John Sheridan, Ken Sicking, Arnold Siler, George Slusher, Billy Ray Smith, Delbert Spare, Billy Staggs, Stan Stall, Ken Starrett, Tom Steffen, Tom Storer, Ralph Swango, Charles Taney, J. H. Thompson, Neal Toebbe, Leslie Toney, O'Neil Tucker, Glenn Wiete, Mike Witte, David Zech.

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PETITION OF THE E. W. SCRIPPS COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The E. W. Scripps Company ("Scripps"), respectfully prays that a writ of certiorari issue for review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on October 23, 1981.

OPINIONS BELOW

The Order of the Court of Appeals denying Scripps' petition for rehearing and suggestion for hearing *en banc*, with dissenting opinion, is set forth as Appendix A to this Petition. The opinion of the Court of Appeals reported as *Heheman v. The E. W. Scripps Co.*, 661 F.2d 1115 (6th Cir. 1981), is set forth as Appendix B to this Petition.

The decision of the United States District Court for the Southern District of Ohio on the cross motions for summary

judgment, unofficially reported as *Heheman v. Bell*, 105 L.R.R.M. (BNA) 3252 (S.D. Ohio 1979), is set forth as Appendix C to this Petition. A separate, unreported order of the District Court on the motion for summary judgment by The Cincinnati Enquirer, Inc. is set forth as Appendix D to this Petition. A separate decision of the District Court on the motions to dismiss, unofficially reported as *Heheman v. Bell*, 1978-1 Trade Cas. (CCH) ¶ 61,975, 84 Lab. Cas. (CCH) ¶ 10,808, 97 L.R.R.M. (BNA) 3198 (S.D. Ohio 1978), is set forth as Appendix E to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 23, 1981. Scripps' timely petition for rehearing and suggestion for hearing *en banc* was denied by Order of the Court of Appeals entered on January 7, 1982. This Petition is filed within ninety days of said Order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804, is set forth as Appendix F to this Petition. The text of Section 8(d) of the National Labor Relations Act as amended, 29 U.S.C. § 158(d), is set forth as Appendix G to this Petition. The text of Section 301 of the National Labor Relations Act as amended, 29 U.S.C. § 185, is set forth as Appendix H to this Petition.

STATEMENT OF THE CASE

The Petitioner, The E. W. Scripps Company, owns as an unincorporated division *The Cincinnati Post ("The Post")*, an afternoon newspaper of general circulation in the Cincinnati, Ohio, metropolitan area. The Cincinnati Enquirer, Inc. ("The Enquirer") is an Ohio corporation which publishes *The Cincin-*

nati Enquirer, a morning and Sunday newspaper of general circulation in the Cincinnati, Ohio, metropolitan area. The individual Respondents are former production employees who worked in the composing room of *The Post*.

The Post, for a number of years, had been suffering a serious financial and competitive decline and by 1977 was a "failing newspaper," as that term is defined in Section 3(5) of the Newspaper Preservation Act ("NPA"), 15 U.S.C. § 1802(5). Scripps was faced with either closing *The Post* entirely or attempting to preserve *The Post's* separate, independent editorial voice by entering into a joint newspaper operating arrangement with The Enquirer pursuant to the NPA.

On September 23, 1977, Scripps and The Enquirer entered into a Joint Operating Agreement ("JOA") to become effective ten days after approval by the United States Attorney General under Section 4(b) of the NPA, 15 U.S.C. § 1803(b). The JOA provided that The Enquirer would perform all mechanical, production and commercial functions of *The Post*, including printing, circulation, advertising, and business operations. *The Post* would cease all such functions, retaining only separate editorial and reportorial functions, as required by Section 3(2) of the NPA, 15 U.S.C. § 1802(2).

On September 28, 1977, in accordance with the requirements of the NPA, Scripps and The Enquirer filed with the Attorney General an application for approval of the JOA. A hearing was ordered on the application, and *The Post's* financial and competitive plight was the subject of seven weeks of hearings before Administrative Law Judge Donald R. Moore. Respondents[1] and others, including the International Typo-

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[1] As the District Court held, under the doctrine of collateral estoppel, the findings and conclusions from the Recommended Decision of Administrative Law Judge Moore ("Moore") adopted by the Attorney General are binding upon Petitioner and Respondents in this case. App. C at 37a-38a.

graphical Union (the Union to which all individual Respondents belong) and the Antitrust Division of the United States Department of Justice, participated fully in the hearings as parties.

The findings of fact in that proceeding detail *The Post's* serious financial and competitive losses and show, among other facts, that from 1972 to 1977, *The Post* had lost $9,815,000 (Moore at 56); that from 1973 through 1977, *The Post* had a negative cash flow of $7,369,000 (*id.* at 63); that as of June 30, 1978, if advances from Scripps were eliminated, *The Post* had a negative net worth of $5,358,428 (*id.* at 65); and that assuming continuation of separate operations, projected losses from 1978 through 1982 totaled $15,400,000 (*id.* at 67).

Judge Moore found that *The Post* was a "failing newspaper," which is defined in the NPA as "a newspaper . . . in probable danger of financial failure." (*id.* at 111) He further found that the facts tended to support the view that *The Post* had already failed financially. *(id.)* In fact, Scripps' Board of Directors had resolved that if the application for the JOA were denied, Scripps would not continue to operate *The Post*. *(id.)*[2]

On December 6, 1979, following approval of the JOA by the Attorney General, *The Post* ceased all mechanical, production and commercial operations and terminated the employees involved in those operations, including Respondents.

The present action is based on a collectively bargained side letter (the "Scanner Side Letter") to the underlying collective bargaining agreement to which The Enquirer and *The Post* and Cincinnati Typographical Union No. 3 ("CTU No. 3") were parties.[3] That collective bargaining agreement, executed on

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[2] Because of the financial failure of *The Post*, it was clear that *The Post's* production operations would ultimately terminate whether or not the JOA were approved and that *The Post's* production employees, including Respondents, had no expectation of continued employment at *The Post*.

[3] The Enquirer and *The Post* bargained jointly as the Cincinnati Daily Newspaper Publisher's Association with CTU No. 3.

May 15, 1973, extended through February 29, 1976, and contained the normal provisions of such agreements, setting forth the wages, hours and other terms and conditions of employment. The Scanner Side Letter was signed on June 10, 1974, by *The Post* and CTU No. 3. The sole focus and concern of that letter was the impact of new technology in the composing room of *The Post*, most importantly, the installation of scanners.[4]

In dealing with that concern, the Scanner Side Letter modified the jurisdictional provisions of the underlying collective bargaining agreement in order to accommodate the new scanner technology being introduced in *The Post's* composing room. In turn, the letter provided extended job security for certain regular situation holders[5] against the introduction of this new technology at *The Post*. The letter also provided for retraining of employees and for a standing committee to resolve disputes arising under the letter. By its express terms, the letter was made dependent on the existing and any and all succeeding collective bargaining agreements to which *The Post* and CTU No. 3 were parties for such indispensable terms as wages, hours and other working conditions.

In 1977, after Scripps and The Enquirer had entered into the JOA but before its approval, the Respondents, as individuals, filed the present action in the District Court for the Southern District of Ohio against the Honorable Griffin B. Bell, then Attorney General of the United States, Scripps, and The Enquirer. In Count I of the Complaint, Respondents made certain claims under the federal antitrust laws and the fifth amendment

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[4] A scanner is a machine which "reads" typed words, permitting copy to be inserted into a computer for typesetting without having been retyped by a printer.

[5] Respondents include both "regular situation holders," who had regular full-time, five day a week positions at *The Post*, and "substitutes," who were employed by *The Post* as needed.

of the Constitution of the United States. This Count was subsequently dismissed (App. E), and its dismissal was not appealed.

In Count II, Respondents alleged that Scripps had violated the Scanner Side Letter by entering into the JOA with The Enquirer. This Count was brought under Section 301 of the National Labor Relations Act, as amended (the "NLRA"), 29 U.S.C. § 185. In Count III, Respondents alleged that The Enquirer had tortiously interfered with their contractual relations with Scripps by entering into the JOA.

In ruling on Count II, the District Court granted Scripps' Motion for Summary Judgment as it related to the substitutes' claims and granted Respondents' Motion for Summary Judgment as it related to the regular situation holders' claims against Scripps. However, the District Court held that as a matter of law, the Scanner Side Letter could not be enforced beyond the March 1, 1981, expiration date of the last collective bargaining agreement between *The Post* and CTU No. 3 for which it had been renewed. The District Court also held that Respondents had no duty to mitigate their damages. (App. C) The District Court had earlier granted The Enquirer's Motion for Summary Judgment on Count III. (App. D)

Cross appeals were filed by the parties. On appeal, the Court of Appeals affirmed the granting of The Enquirer's Motion for Summary Judgment. The Court of Appeals reversed the granting of Scripps' Motion for Summary Judgment as it related to the substitutes' claims but affirmed the granting of Respondents' Motion for Summary Judgment as it related to regular situation holder claims. However, the court reversed the District Court's determination that the Respondents had no duty to mitigate their damages. Finally, the Court of Appeals reversed the District Court's determination that the Scanner Side Letter could not be enforced beyond March 1, 1981.

REASONS FOR GRANTING THE WRIT

In this case, the Court of Appeals has fashioned new federal labor law by issuing a decision, in a case the court itself views as not being entirely free from doubt (App. B at 13a), by requiring the District Court to impose upon Scripps the terms of future collective bargaining agreements, in contravention of Section 8(d) of the NLRA, 29 U.S.C. § 158(d), and in direct conflict with decisions of the Supreme Court and of other Courts of Appeals.

Furthermore, the Court of Appeals has failed to consider the declared public policies and objectives of the NPA by rendering a decision which undermines, rather than furthers, these policies and objectives. *The Post* has been able to maintain its separate editorial voice only as a result of the NPA which permits a failing newspaper to reduce labor and other costs by combining all mechanical, production and commercial functions with its competitor under a JOA. However, the Court of Appeals has jeopardized the JOA by requiring the continuing payment of wages to over 100 former employees for whom there is no work. The objectives of other equally important federal legislation should not be ignored in construing and fashioning federal labor law.

Finally, *The Post* has ceased all mechanical, production, and commercial operations. The collective bargaining relationship between *The Post* and CTU No. 3 was based on the now terminated production operations. The Court of Appeals' holding that employment opportunities survive such termination is in conflict with decisions of the Supreme Court and other federal courts.

A. A Federal Court Cannot Establish The Terms Of Collective Bargaining Agreements.

The Court of Appeals cites no authority for its decision that a court can and should fill "in missing contract terms," (App. B at

15a), for a future generation of hypothetical collective bargaining agreements after the parties' collective bargaining relationship has terminated permanently. This decision is in fundamental conflict with the NLRA and with decisions of the Supreme Court and other Courts of Appeals.

The Scanner Side Letter provided that a printer was to be "paid the then applicable wage scale for printers (and covered by any other terms and conditions of employment) which are *negotiated* and *set forth* in the *existing* and *any* and *all succeeding collective bargaining agreements* between the Post and the Union." (Emphasis supplied.) The letter itself contains no terms regarding wages, hours, fringe benefits, or working conditions. For each of these vital ingredients of an employment relationship, the letter is expressly dependent upon the particular collective bargaining agreement negotiated and in effect from time to time. The last collective bargaining agreement expired as of March 1, 1981. Absent a new agreement arrived at through negotiation, there exists nothing to which either a court or a jury may look for the wages, hours, and other terms and conditions of employment.

Section 8(d) of the NLRA, 29 U.S.C. § 158(d), prohibits the compelling of agreement between parties in a collective bargaining relationship. In its report accompanying the NLRA, the Senate Committee underscored this prohibition, emphasizing that the Act was designed neither to compel agreement nor to permit governmental supervision of the terms of agreement. S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935).

This prohibition is reinforced by decisions of the Supreme Court and other federal courts establishing that as a matter of federal labor law[6] no governmental agency or court may im-

[6] The action against Scripps was brought under Section 301 of the NLRA, 29 U.S.C. § 185, based on the alleged violation of a collectively bargained agreement, namely, the Scanner Side Letter, which was a side letter to another collective bargaining agreement. Therefore, federal labor law must

pose upon management or a union the substantive terms of an agreement. *UMW Health & Retirement Funds v. Robinson*, 50 U.S.L.W. 4288, 4291 (U.S. Mar. 8, 1982); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 282-83 (1972); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103-07 (1970); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 486-87 (1960); *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401-04 (1952); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937); *NLRB v. J. P. Stevens & Co., Inc., Guliston Division*, 538 F.2d 1152, 1165 (5th Cir. 1976); *New York District Council No. 9 v. NLRB*, 453 F.2d 783, 787 (2d Cir. 1971), *cert. denied*, 408 U.S. 930 (1972); *Indiana Metal Products v. NLRB*, 442 F.2d 46, 53 (7th Cir. 1971); *M.R.&R. Trucking Co. v. NLRB*, 434 F.2d 689, 695 (5th Cir. 1970). In *NLRB v. Sumner Home for the Aged*, 599 F.2d 762, 766 (6th Cir. 1979), the Court of Appeals for the Sixth Circuit reaffirmed this settled principle.

Rather than applying this settled rule of federal labor law as had the District Court, the Court of Appeals reversed and remanded with instructions that the District Court fill "in missing contract terms" (App. B at 15a), for future collective bargaining agreements.[7]

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be applied. *E.g., Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

[7] The Supreme Court has long recognized that a collective bargaining agreement is not an ordinary commercial contract governed by the same common law concepts which control private commercial contracts. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964). Rather, such agreements are generalized codes which call into being a new common law, the common law of a particular industry or particular plant. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960). Thus, the law governing such agreements cannot be based upon "abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context." *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 (1967). Disregarding these precepts, the

Thus, in directing the District Court to write a series of collective bargaining agreements for *The Post* and CTU No. 3, whose collective bargaining relationship has ceased, the Court of Appeals is in conflict with the NLRA, with decisions of the Supreme Court and other Courts of Appeals, with the terms of the Scanner Side Letter itself, and with a most basic and fundamental principle of collective bargaining.

B. The Court Of Appeals' Decision Undermines The Policies And Objectives Of The Newspaper Preservation Act.

Congress has declared that as a matter of public policy competing newspaper editorial voices should be preserved and has provided an exemption from the antitrust laws to effectuate that policy. Section 2 of the NPA, 15 U.S.C. § 1801, states the congressional declaration of policy as follows:

> In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

The Court of Appeals, however, has placed a staggering burden, potentially reaching many millions of dollars, on a

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Court of Appeals relies upon *Corbin on Contracts* and *The Restatement* for the commercial contract law proposition that if there is clear evidence of an intent to agree upon future contract terms, then a court may fill in those terms. (App. B at 13a-14a) These authorities are utterly uninstructive in the context of collectively bargained agreements and the impact of plant closings on such agreements, and are in conflict with the federal labor principle that the obligation to negotiate is not attended by a duty to agree. 29 U.S.C. § 158(d). In any event, the Scanner Side Letter contains no evidence of an intent to agree. It merely describes the methodology — collective bargaining between CTU No. 3 and *The Post* — by which essential terms such as wages were to be negotiated.

financially failing newspaper solely because that paper, instead of completely closing its doors, has entered into a JOA enabling it to maintain a separate, independent editorial and reportorial voice in the Cincinnati metropolitan area.[8] If *The Post* had simply closed its doors, even Respondents conceded that there would be no liability.

It is submitted that a proper accommodation of the NPA requires federal labor law to be construed so as to put Scripps in no worse position for having been found entitled to the protection of the NPA than if it had terminated *The Post's* operations entirely.[9] If the congressional objectives of the NPA, as well as settled labor law, had been properly considered, a decision could have been rendered without doing violence to either, rather than doing violence to both.

In other areas, federal courts have recognized the need to accommodate labor policy to reflect other important federal policies. For example, in the bankruptcy area, the courts have recognized that federal labor law must give way in order to accommodate the purposes of the Bankruptcy Act. *Local Joint Executive Board v. Hotel Circle, Inc.*, 613 F.2d 210 (9th Cir. 1980); *Shopmen's Local Union No. 455 v. Kevin Steel Products*, 519 F.2d 698 (2d Cir. 1975); *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975). A similar accommodation has been made to recognize important policies of federal maritime law. *U.S. Bulk Carriers v. Arguelles*, 400

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[8] Respondents' expert calculated that Respondents were entitled to $52 million in damages. In addition, Scripps has already paid Respondents over $3 million dollars for the period between December 6, 1979, and March 1, 1981, during which time Respondents performed no work.

[9] In fact, *The Post* has gone out of the business of producing, printing and distributing a newspaper, which was its only business with a place for production employees such as Respondents. As far as Respondents and other production workers are concerned, *The Post* has closed its doors.

U.S. 351, 352-58 (1971); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942); *Mt. Vernon Tanker Co. v. NLRB*, 549 F.2d 571, 575-76 (9th Cir. 1977).

Here, there has been no accommodation. The Court of Appeals, in a case which it views as not entirely free from doubt, has failed to accord due recognition to the fact that the parties were before the court only because Scripps was furthering the stated purpose of the NPA by entering into a JOA rather than undermining that purpose by closing *The Post's* doors. Now, however, the court's decision confronts Scripps, again, with the question whether *The Post* can be maintained, even with joint operations, so that the policies and objectives of the NPA may be carried out. Where, as here, a court can easily further the purposes both of established labor law and of other federal legislation, it should do so, rather than creating conflicts between federal labor law and the NPA.

C. Under Federal Labor Law Principles, Production Employment Opportunities Do Not Survive The Termination of The Post's Production Operations.

Under the Court of Appeals' decision, a collectively bargained side letter, dealing with jurisdictional modifications to a collective bargaining agreement and providing job protection, has been construed as an independent employment contract which continues after the termination of the operations to which it relates. [10] This construction is unprecedented and is in conflict

[10] The Scanner Side Letter is undeniably a collectively bargained agreement, not an individual employment contract. It was negotiated between CTU No. 3 and *The Post;* there were no negotiations with any individual printer. Its terms are uniform with respect to all members of the class of employees covered. It confers no right of individual action. A "Standing Committee" representing CTU No. 3 and *The Post*, rather than a court, was assigned responsibility for interpreting it. Most importantly, CTU No. 3 had the express right to act for all printers in cancelling the letter. It lacks most of the essential elements of an individual contract of employment and cannot stand alone.

with decisions of the Supreme Court and other Courts of Appeals.

Under federal labor law, *The Post* has the inherent right to close all or any part of its operations. *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 268 (1965); *Fraser v. Magic Chef-Food Giant Markets, Inc.*, 324 F.2d 853 (6th Cir. 1963); *Bakery & Confectionery Workers International Union Local No. 128 v. Great A&P Tea Co.*, 357 F. Supp. 1322 (W.D. Pa. 1973), *aff'd mem.*, 491 F.2d 748 (3d Cir. 1974); *American Bakery & Confectionery Workers International Union Local No. 12 v. Liberty Baking Co.*, 242 F. Supp. 238 (W.D. Pa. 1965). This right is of such importance that a company will not be held to have surrendered it without a clear and unequivocal waiver. *Textile Workers v. Darlington*, 380 U.S. at 270; *Fraser v. Magic Chef*, 324 F.2d at 856.

Furthermore, it is a basic principle of federal labor law that a collective bargaining agreement is a trade agreement governing the ongoing terms and conditions of employment and is not a contract of employment. *J. I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944). A collective bargaining agreement presupposes an ongoing company-union relationship; it does not create an employer-employee relationship nor does it guarantee the continuation of one. *Fraser v. Magic Chef*, 324 F.2d at 856.

Any right to employment under such an agreement does not survive the discontinuation of the business or the termination of its operations. *Fraser v. Magic Chef*, 324 F.2d at 856; *Union de Trabajadores de la Industria Gastronomica de Puerto Rico v. Helio San Jeronimo Corp.*, 434 F. Supp. 643, 646 (D.P.R. 1977); *American Bakery & Confectionery Workers International Union v. Liberty Baking Co.*, 242 F. Supp. at 245. This principle applies even where a collective bargaining agreement guarantees an opportunity for employment for an as yet unexpired term. *Union de Trabajadores*, 434 F. Supp. at 647

(employment guaranteed for a minimum number of hours a year).

Rather than following these well-established principles of federal labor law, the Court of Appeals, in conflict with the above cases, based its decision on a misapplication of commercial law concepts,[11] and in so doing refused to recognize the special nature of collective bargaining agreements.

[11] For example, the Court of Appeals indicated that it was now time to abandon the universally accepted rule that lifetime employment contracts are not favored, and that such contracts are fulfilled when an employer no longer has work to be performed of the sort for which the employee was hired. As support, the court cited two inapposite authorities. The first was a student note in the *Harvard Law Review* which deals only with employment terminable at will, where the student author expressly limits his social observations to situations in which the employee is not represented by a union. 93 Harv. L. Rev. 1816, 1816 n.2 (1980). The second was G. Lodge, H. Okamoto & B. Roberts, *Collective Bargaining and Employee Participation in Western Europe, North America and Japan* 75-84 (1979). The cited section deals exclusively with Japan and begins: "The industrial relation system in Japan differs significantly from Western Europe and North America . . .." *Id.* at 75.

CONCLUSION

For the foregoing reasons, Petitioner, The E. W. Scripps Company, respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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Appendix

APPENDIX A

Nos. 80-3017
80-3024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BERNARD J. HEHEMAN, *et al.*,
Plaintiffs-Appellants,
Cross-Appellees

v.

THE E. W. SCRIPPS COMPANY,
Defendant-Appellee,
Cross-Appellant

and

THE CINCINNATI ENQUIRER, A
corporation organized under the laws of Ohio,
Defendant-Appellee

ORDER DENYING PETITION
FOR REHEARING EN BANC

(Filed January 7, 1982)

Before: ENGEL and MERRITT, Circuit Judges; PHILLIPS, Senior Circuit Judge

A majority of the Court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

FILED
JAN 7 1982
JOHN P. HEHMAN, Clerk

Bernard J. Heheman, et al., plaintiffs-appellants, cross-appellees v. *The E. W. Scripps Company, defendant-appellee, cross-appellant and The Cincinnati Enquirer, A corporation organized under the law of Ohio, defendant-appellee*
Nos. 80-3017/80-3024

WEICK, Circuit Judge, dissenting: I respectfully dissent from the denial of en banc consideration of the suggestion of The E. W. Scripps Company for an en banc consideration of its petition for rehearing.

This case involves important legal questions, namely, an interpretation of procedures under the Newspaper Preservation Act, 15 U.S.C. § 1801 (1976) by which The Post, a failing newspaper in Cincinnati, Ohio, was given permission to enter into a joint operating agreement with The Cincinnati Enquirer, another Cincinnati newspaper to reduce costs, which agreement provided, *inter alia*, for The Post to be composed and printed by the Enquirer. As a result it was not necessary for The Post to operate a composing room and it no longer needed any printers and they all lost their jobs.

The printers filed suit for damages against the publisher of The Post, E. W. Scripps Company and The Cincinnati Enquirer under the Labor Management Relations Act, 29 U.S.C. § 1851, claiming breach of their Collective Bargaining Agreement (C.B.A.) with the Union and also breach of the provisions of a Scanner Agreement, which they claimed guaranteed them, as situation holders, lifetime employment. The claim against the Enquirer was in tort based upon alleged interference with their contract with The Post.

The District Court granted summary judgment against the substitute printers and also against the situation holders printers on their tortious interference claims against the Enquirer. Later, the District Court on cross-motions for summary judgment held that the situation holders were entitled to damages for breach of the Scanner Agreement but that because the Scanner Agreement was dependent on the 1976 Collective Bargaining Agreement, the Scanner Agreement expired in 1981 when the Collective Bargaining Agreement expired.

It is submitted that the decision of the District Court was correct because the Collective Bargaining Agreement provided for all the terms and conditions of employment of the printers. The panel erred,

it is submitted, in looking elsewhere for the terms and conditions of employment where none existed. In so doing, the panel applied state law, which was incorrect as the case was governed by federal law, under which it is settled that a court may not supply the terms of a collectively bargained agreement. 29 U.S.C. § 158(d). *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970). Even under state law, the panel's decision was incorrect. *E.g., Boleman v. Congdon and Carpenter Co.*, 638 F.2d 2 (1st Cir. 1981).

Under the arrangement with the Enquirer, The Post did not need any printers and if The Post continued to employ them, the printers would have no work to do or duties to perform. Where an employer ceased to operate his business in whole or in part, he no longer needs the services of his employees and he ought not to be held liable in damages. Their claims for damages, it was testified to by an expert, would aggregate about $50,000,000.

It is noteworthy that the panel held that the District Court erred in granting summary judgment on legal issues in favor of Scripps, but held that the District Court should have entered summary judgment on factual issues which were disputed. This is inconsistent and conflicts with Rule 56 Federal Rules Civil Procedure. It was also inconsistent with the panel's ruling that the printers owed a duty to mitigate damages.

The panel was correct in holding that there was no liability on the part of the Enquirer in agreeing to the arrangement and that the ruling of the District Court in that respect should be affirmed.

APPENDIX B

No. 80-3017
No. 80-3024

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BERNARD J. HEHEMAN, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

THE E. W. SCRIPPS COMPANY,
Defendant-Appellee,
Cross-Appellant,

and

THE CINCINNATI ENQUIRER, A Corporation Organized Under The Law of Ohio,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed October 23, 1981

Before: ENGEL and MERRITT, Circuit Judges; PHILLIPS, Senior Circuit Judge.

MERRITT, Circuit Judge. In this case we are called upon to decide what effect should be given to an agreement in the newspaper industry guaranteeing lifetime job security for printers. The newspaper terminated the workers covered by the agreement following a partial reorganization and merger.

We reverse the decision of the District Court which declined to give full effect to the job security agreement.

I. STATEMENT OF THE CASE

By the late 1960's, new computer technology was beginning to work dramatic changes in traditional relationships between publishers and printers in the newspaper industry. Computers that could "scan" typewritten scripts and directly typeset their words without retyping by printers made it possible for highly skilled linotype operators to be replaced by less skilled employees and computerized equipment.

Like other newspapers across the country, the Cincinnati Post and the Cincinnati Enquirer were affected. A letter of understanding signed with a 1973 collective bargaining agreement between the Cincinnati Daily Newspaper Publishers Association, the negotiating agent of the Post and the Enquirer, and the Cincinnati Typographical Union Number Three, which included the printers for both papers, made explicit reference to changes that might be precipitated by the new technology. The letter noted that the parties agreed to defer discussions of the printers' job security until the effects of equipment the newspapers might introduce could be foreseen more precisely. Those discussions led to the execution of what the parties called the "Scanner Agreement" on June 10, 1974. Signed by representatives of the Post and the typographical union, it is quite short. It details new equipment the newspaper would install and describes its effects on full-time employees – called "situation holders." And it appears, through language that lies at the center of the parties' dispute, to guarantee named situation holders lifetime employment in exchange for their acceptance of the new equipment:

> **Job Security**
>
> The Post and Times-Star agrees that all regular situation holders and apprentices who will become regular

situation holders, as listed in the Post's priority list dated May 1, 1974, *will be continuously employed for the remainder of their working lives by The Post as printers,* subject to voluntary terminations, voluntary retirements, disability retirements: as prescribed and defined in F. I. C. A. (Social Security Act) and involuntary terminations for just cause, as provided in Section 21 of the Contract. In case a strike, lockout or "act of God" results in a period of temporary suspension of the employer's composing room operation, the job security will be suspended for such period of temporary suspension of operation only. *This Job Security Agreement* shall supersede any and all existing contracts and/or agreements between The Post and Times-Star and the Union for said named employees, and *is permanent* unless cancelled by mutual agreement of both The Post and the Union.

During such continuous employment of such an employee by The Post as a printer, he or she will be paid the then applicable wage scale for printers (and covered by any other terms and conditions of employment) which are negotiated and set forth in the existing and any and all succeeding collective bargaining agreements between The Post and the Union. *The Post and Times-Star,* in addition to its commitment to provide the aforementioned job security to certain named printer employees, *has assured the Union that in the future it will continue to make composing room job opportunities available* to such employees so that they can continue to perform meaningful and gainful work for The Post. (Emphasis added.)

The Scanner Agreement also contains a buyout clause providing from $1000 to $10,000 to those regular situation holders who voluntarily leave the Post within specified time periods. The Agreement provides a lesser guarantee to substitute printers; it guarantees them that they would be of-

fered five days work per week until February 29, 1976. In 1976 a renewal collective bargaining agreement was signed, to be effective until March 1, 1981. It provides that in pertinent part the 1974 Scanner Agreement was to remain in effect, and it provided further incentives for situation holders who chose to retire early.

Faced with continuing financial difficulties despite the industry's technological advances, the Post entered into negotiations with the Enquirer with the aim of reducing costs by combining some operations. In September 1977 the newspapers executed a joint operating agreement that provided, *inter alia*, for the Post to be composed and printed by the Enquirer. On grounds that the Post qualified as a "failing newspaper" under the provisions of the Newspaper Preservation Act, 15 U.S.C. § 1801 (1976), the Post applied to the Attorney General of the United States for an exemption to antitrust laws that would otherwise prohibit the arrangement between competitors. The joint operating agreement was to take effect after written consent was granted by the Attorney General. Hearings on the application were held before an administrative law judge. They lasted nearly seven weeks and created a transcript over 6000 pages long. Plaintiffs and the International Typographers Union participated in them. The administrative law judge issued a 143-page recommended decision in May 1979. He concluded that the Post was "in probable danger of financial failure," the standard imposed by 15 U.S.C. § 1802(5), and that approval of the joint operating agreement would effectuate the purposes of the Newspaper Preservation Act. The administrative law judge's conclusions were adopted by the Attorney General in November 1979, and the Cincinnati newspapers were thereby granted an exemption from the antitrust laws.

The next month the Post's composing room was closed, and all the printers were fired.

In December 1977, having received word that they would lose their jobs, more than one hundred situation holders and

substitute printers filed this suit in the Southern District of Ohio against the publisher of the Post, E. W. Scripps Co., and the Cincinnati Enquirer, Inc. Jurisdiction was based on § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. They claimed breach of their collective bargaining agreement, and they claimed that the Enquirer, by taking over the Post's printing operations, had tortiously interfered with the lifetime employment provisions of the Scanner Agreement. Their claims for damages for those actions are before this court. Plaintiffs also set out due process and antitrust claims, and Scripps counterclaimed for tortious interference with *its* negotiating rights. Those claims were dismissed, and their dismissal has not been appealed.

In July 1978 the District Court granted summary judgment against the substitute printers. In August 1979 it granted summary judgment against the situation holders on their tortious interference claim against the Enquirer. In November 1979, on cross-motions for summary judgment, the court held that the situation holders were entitled to damages for breach of the Scanner Agreement but that because the Scanner Agreement was dependent on the 1976 collective bargaining agreement, the Scanner Agreement expired when the underlying agreement expired in 1981. The court held that the situation holders had no obligation to mitigate damages for the period running from the time they were discharged until the 1981 expiration. Each of the rulings described in this paragraph is before this court.

II. THE LIFETIME EMPLOYMENT GUARANTEE OF THE SCANNER AGREEMENT

There can be little dispute about the apparent guarantee of the Scanner Agreement. It provides, quite simply, that all regular situation holders "will be continuously employed for the remainder of their working lives by the Post." The guarantee of continuous employment is subject only to voluntary

terminations or retirements, disability retirements, and involuntary terminations for just cause. The guarantee is more than a promise to provide compensation; the newspapers promised "to make composing room job opportunities available . . . so that [the printers] can continue to perform meaningful and gainful work." Scripps does not challenge that language on its own terms. It argues, rather, that the apparent guarantee of lifetime employment is now ineffective, for two reasons. It argues first that because the Scanner Agreement explicitly incorporates terms of and is otherwise dependent on collective bargaining agreements between the newspaper and its printers, it therefore expired when the collective bargaining agreement expired, in March 1981. That view was adopted by the District Court. Scripps argues second that the apparent guarantee of the Scanner Agreement is ineffective in the context of the elimination of the Post's printing operations. We reject both of those arguments, and treat them in turn.

A. The Effect of the Expiration of the Underlying Collective Bargaining Agreement

In holding that the Scanner Agreement's guarantee of employment expired in March 1981 when the underlying collective bargaining agreement expired, the District Court concluded that while the Scanner Agreement "more or less speaks for itself," it was explicitly dependent upon the then-existing and any succeeding collective bargaining agreements for essential conditions of employment, including wages and hours. The court concluded that in the absence of a bargaining agreement supplying such terms, the Scanner Agreement's guarantee was ineffective. The court emphasized that in determining the intent of the parties, it was placing heavy weight on the relation of the $10,000 maximum buyout price (the amount Scripps would pay those who voluntarily left their jobs) to the annual earnings printers would receive were they to retain their jobs. The court apparently inferred from the

relatively low buyout price that the Scanner Agreement's apparent promise of lifetime employment could not have been intended to be what its express terms would otherwise imply.

We decline to draw that inference. The language of the Scanner Agreement is just too explicit to justify overruling it on the basis of a court's balancing of the value of a lifetime employment contract against a buyout price. The purpose of the buyout provision was not to convince *every* situation holder to sell his contract rights – neither party to the Scanner Agreement foresaw at the time of its execution that the Post would soon need *no* printers – but merely to provide an incentive for some to do so. In that objective it was successful; the record indicates that several dozen situation holders exercised their buyout option.

Nothing in the Scanner Agreement indicates that the parties intended its guarantees to expire when underlying collective bargaining agreements lapsed. The Scanner Agreement explicitly states that it is to "supersede any and all existing contracts and/or agreements between" the parties "and is permanent unless cancelled by mutual agreement of both" parties. That language cannot be reconciled with Scripps' claim that the parties intended the promise of employment to extend only over the term of negotiated bargaining agreements. It is true, as Scripps points out, that portions of the parties' collective bargaining agreement are incorporated into the Scanner Agreement. But the old and common-sensical rule that "a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified." *Guerini Stone Co.* v. *P. J. Carlin Construction Co.*, 240 U.S. 264, 277 (1916), prevents the incorporation into the Scanner Agreement of the expiration date of the collective bargaining agreement. The Scanner Agreement incorporates the underlying collective bargaining agreement not for determining the duration of employment, but only for determining the "ap-

plicable wage scale . . . and other terms and conditions of employment."

In concluding, as we do, that the intent of the parties was to provide guaranteed employment beyond the duration of any particular collective bargaining agreement, we are not unconscious of the traditional reluctance of courts to construe employment contracts as lifetime guarantees. This Scanner Agreement, however, is simply too precise and too unambiguous to permit any other inference about the intent of the contracting parties. Moreover, the laissez-faire social policies of the nineteenth century which led courts to abandon earlier legal principles encouraging job security for employees have been replaced in this century by congressional, executive and judicial policies encouraging the bargaining for job security. See Note, 93 HARV. L. REV. 1816, 1824-36 (1980). We also note that much modern scholarly writing on industrial relations argues that job security agreements and customs encourage a higher degree of worker loyalty and hence raise the level of productivity. *See, e. g.*, Roberts, Okamoto & Lodge, COLLECTIVE BARGAINING AND EMPLOYEE PARTICIPATION IN WESTERN EUROPE, NORTH AMERICA AND JAPAN, 75-84 (1979).

Scripps argues also that whatever the intent of the parties, the lapse of the underlying collective bargaining agreement means that the Scanner Agreement became unenforceable because of the absence of essential conditions – that is, the wage scale and other terms of employment set out in collective bargaining agreements. It argues that the absence of such terms leaves a court or a jury with no means of fixing Scripps' obligations and therefore renders the Scanner Agreement unenforceable.

It is well settled that federal rather than state law governs our analysis of that claim. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). Although this Court has recognized that not all principles of general contract law are applicable in the interpretation and construction of collective

bargaining agreements, *Kellogg Co.* v. *N.L.R.B.*, 457 F.2d 519, 524 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972), it is usually held that general contract principles of offer and acceptance are applicable in determining whether an enforceable labor agreement exists at all. *United Steelworkers* v. *Bell Foundry Co.*, 626 F. 2d 139, 140 (9th Cir. 1980); *F. W. Means & Co.* v. *N.L.R.B.*, 377 F.2d 683, 686 (7th Cir. 1967). *See Kentucky Skilled Craft Guild* v. *General Electric Co.*, 431 F.2d 62, 66-67 (6th Cir. 1970).

Though the matter is not entirely free from doubt — no settled standards have evolved from the case law — we conclude that the lapse of the underlying collective bargaining agreement and the resultant absence of negotiated wage terms and other conditions of employment do not render the Scanner Agreement unenforceable. It seems clear beyond argument, as already noted, that the parties intended to bind themselves. They undoubtedly assumed that normal bargaining processes would continue to set the terms of employment; they failed to foresee the complete loss of bargaining power the closing of the Post's printing room caused. As Professor Corbin has concluded, a court should work to avoid finding a contract unenforceable

> [i]f it is convinced that the parties themselves meant to make a "contract" and to bind themselves to render a future performance. Many a gap in terms can be filled, and should be, with a result that is consistent with what the parties said and that is more just to both than would be a refusal of enforcement.

Corbin on Contracts § 97 at p. 426. THE RESTATEMENT (SECOND) OF CONTRACTS sets out guidelines of similar effect:

> A promises B to do a specified piece of work and B promises A to pay a price to be thereafter mutually agreed. The provision for future agreement as to price strongly indicates that the parties do not intend to be

> bound. If they manifest an intent to be bound, the price is a reasonable price at the time for doing the work.

§ 32, illustration 8 (Tentative Draft No. 1, 1964). The terms of the Scanner Agreement overcome the presumption that the parties did not intend to be bound. The printers and Scripps were not two otherwise unrelated parties who had agreed to try to reach an agreement on the terms of some future relationship, as in *General Motors Corp.* v. *Keener Motors*, 194 F.2d 669, 676 (6th Cir. 1952). The National Labor Relations Act does not, as Scripps points out, compel employers and employees to reach agreement. 29 U.S.C. § 158(d). But the terms of the parties' prior agreement and the requirement of good faith bargaining imposed by § 158(d) do mean that Scripps and its printers were bound together in a way that unrelated parties agreeing to reach an agreement on the terms of an individual service contract are not.

Scripps' claim that the Scanner Agreement fails for absence of essential terms is not an easy argument for it to articulate since it is the party who by its breach of contract made unavailable the process by which the contract terms were to be supplied. Corbin cites approvingly the decision in *Landow-Luzier Co.* v. *Grey*, 232 N.Y.S.2d 247, 34 Misc. 2d 1061 (1962), which held that

> [A]n exclusive brokerage contract was not too indefinite for enforcement by reason of the fact that "the terms whereby the plaintiff would earn commissions were not spelled out but depended on agreement between defendants [the employer] and the respective third parties. If the terms to be agreed upon never became definite because of the defendants' initially wrongful action in breaching the contract, the defendants cannot plead lack of definiteness as a defense."

Corbin on Contracts § 98 at 444. We do not believe the District Court on remand will have serious difficulty in this case, after giving the parties an opportunity to be heard on the

issue, in filling in missing contract terms and in fashioning a remedy for the breach in accordance with general principles of damages under Ohio law.

B. The Effect of the Closing of the Post's Printing Facilities

Scripps' second argument in support of its claim that the apparent lifetime guarantee of the Scanner Agreement is no longer effective is that its obligations toward plaintiffs ended when its printing operations shut down. Its argument, essentially, is that the Scanner Agreement was not meant to apply in such a context. It argues that any responsibilities it had toward plaintiffs, therefore, ended December 6, 1979, the date printing operations ended at the Post. The District Court rejected the argument, and we agree.

It is clear, as Scripps urges, that neither federal labor law nor ordinary collective bargaining agreements compel an employer to maintain in operation all or any part of its business. *Fraser* v. *Magic Chef-Food Giant Markets, Inc.*, 324 F. 2d 853 (6th Cir. 1963). But plaintiffs' claim does not rest on any alleged violation of labor law; it rests instead solely on the terms of the Scanner Agreement. The Supreme Court has recognized the distinction between, on the one hand, collective bargaining agreements that set conditions of employment but guarantee no individual a job, and on the other, contracts of employment that do guarantee jobs. *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 334-35 (1944). The Supreme Court noted that "in rare cases" collective bargaining agreements are contracts of employment, and the explicit language of the Scanner Agreement makes clear that it is, as the District Court concluded, among such cases.

It may be the case — a point we need not decide — that Scripps would not be liable to plaintiffs were it to go out of business entirely. Plaintiffs concede that the Scanner Agreement was not meant to apply in the event of complete financial failure. But as the District Court concluded, the Post

has not in any meaningful sense gone out of business. It is still being published; it is still producing revenue. If it had gone completely out of business, all parties involved in the organization – shareholders, managerial officers, editorial employees, and printing employees – would have borne some loss. By closing down its printing operations without compensating plaintiffs, Scripps has sought to force them to bear a disproportionate share of the losses caused by the Post's financial difficulties.

Scripps points out, and plaintiffs concede, that the focus of the Scanner Agreement was the protection of the printers against the effects of new technology. But Scripps claims that the merger of printing operations at the Enquirer's place of business is outside the scope of the Scanner Agreement and, therefore, led to a loss of employment for which the Agreement provides no remedy. But Scripps does not deny that technological advances underlay the consolidation of printing operations. Uncontradicted deposition testimony by the chief executive officer of the Enquirer establishes that it was technological change that allowed his paper's printers to produce an additional paper without further hirings. Technological advancement seems clearly to be a factual and proximate cause of the harm plaintiffs have suffered. The site of the technological advance – whether at the Post, as the Scanner Agreement undoubtedly contemplated, or at the Enquirer, as in fact occurred – does not affect that conclusion.

We, therefore, reject Scripps' arguments that we should not give effect to the plain language of the Scanner Agreement guaranteeing job security for printers, and we reverse the decision of the District Court that Scripps' liability is limited to a period that ends with the termination of the last collective bargaining agreement.

III. MITIGATION OF DAMAGES

The District Court held that plaintiffs need not mitigate damages for the fifteen-month period over which it held Scripps to be liable. It held that the printers "need not seek or accept other employment," though if they did receive other remuneration the money received would serve to reduce their damage award. We also reverse the decision below on the issue of mitigation.

A. Availability of Specific Performance

We dispose as a preliminary matter of plaintiffs' contention that if mitigation is demanded of them, they are entitled instead to specific performance of the Scanner Agreement. In rejecting that argument, we need not rely on plaintiffs' probable waiver of that remedy – they represented to the District Court that they would not seek specific performance (App. 109, 453-54), and no ruling on the remedy was issued – in concluding that specific performance is unavailable to them. Instead, we rely primarily on provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, which we conclude deprives the court of jurisdiction to issue an order for specific performance.

The broad command of § 101 is that

> [n]o court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any . . . injunction be issued contrary to the public policy declared in this chapter.

The more specific provisions of § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provide that

> [n]o court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or grow-

> ing out of any labor dispute to prohibit any person . . . from . . .
>
> (a) . . . refusing . . . to remain in any relation of employment. . . .

Though the Act was principally directed toward abuses of injunctions directed against union activities, *e.g.*, *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250-51 (1970), the terms of its broadest prohibitions do not distinguish between injunctions against labor and injunctions against management. The Court has recognized that as the labor movement has grown in power, congressional attention has shifted from protection of labor unions to encouragement of collective bargaining and other techniques for peaceful resolution of industrial disputes. The shift has occurred without revision of such older statutes as the anti-injunction provisions of Norris-LaGuardia, thus throwing upon the courts the task of accommodating and reconciling older statutes with newer ones, among the latter § 301 of the Labor Management Relations Act. *Id.*

The result has been the creation of narrow exceptions to the broad anti-injunction provisions of the Norris-LaGuardia Act, principally the grant of specific performance against management of grievance arbitration clauses, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), and against unions of no-strike provisions, the *quid pro quo* of arbitration clauses. *Boys Markets*, *supra*, 398 U.S. at 248. In *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397 (1976), the Court, in refusing to extend the scope of *Boys Markets*, emphasized the continuing vitality of Norris-LaGuardia:

> The driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties. Only to that extent was it held necessary to accommodate § 4 of the Norris-LaGuardia Act to § 301 of the Labor

> Management Relations Act and to lift the former's ban against the issuance of injunctions in labor disputes.
>
> . . . .
>
> [A]side from the enforcement of the arbitration provisions of such contracts, within the limits permitted by *Boys Markets*, the Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act. In the course of enacting the Taft-Hartley Act, Congress rejected the proposal that the Norris-LaGuardia Act's prohibition against labor-dispute injunctions be lifted to the extent necessary to make injunctive remedies available in federal courts for the purpose of enforcing collective-bargaining agreements.

428 U.S. at 407, 409. The Court has not moved beyond the specific areas arising in *Lincoln Mills* and *Boys Markets* in carving exceptions to the prohibitions of the Norris-LaGuardia Act. It has not treated the issue facing us here: whether specific performance of a collective employment contract is a remedy available to employees.

Lower courts have encountered the issue with remarkable infrequency. Apparently just two courts of appeals have treated issues at all analogous. In each case the court has granted an injunction on the ground that the activity sought to be enjoined did not appear on the list of specifically enumerated prohibitions contained in the Norris-LaGuardia Act at 29 U.S.C. § 104. In *Retail Clerks Union* v. *Alfred M. Lewis, Inc.*, 327 F.2d 442 (9th Cir. 1964), the court reversed a district court's dismissal of a suit asking an employer to comply with a cost of living wage adjustment provision contained in a collective bargaining agreement. The court held that the Norris-LaGuardia Act did not deprive it of jurisdiction because no specific provision of § 104 of the Act was applicable. Accordingly, the court concluded, the case did not involve "the type of 'labor dispute' to which Norris-LaGuardia is

directed." *Id.* at 448. In *Parks* v. *International Brotherhood of Electrical Workers*, 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963), the court concluded in a suit by a local union and its members against its international parent union that Norris-LaGuardia should not prevent specific performance of an agreement between them. Relying on *Lincoln Mills*, in which the Court had concluded that the Act was not aimed at preventing specific performance of arbitration agreements, the Fourth Circuit concluded that the "injunctive relief sought by [the local union] – restoration of its charter, etc. – may also be said not to be 'a part and parcel of the abuses against which the Act,' as indicated by the specific matters listed in [§ 104], was directed." *Id.* at 919. In the instant case, unlike those two cases, the relief sought *is* among the areas listed in § 104: the printers ask the court "to prohibit" Scripps from "refusing . . . to remain in [a] relation of employment. . . ." 29 U.S.C. § 104(a). In a case involving issues quite similar to those in this case, at least one court has reached the conclusion that the Act bars equitable relief. In *Pacific Log Scalers Ass'n* v. *Columbia River Log Scaling and Grading Bureau*, 88 L.R.R.M. 2974, 76 Lab.L.Rep. (CCH) ¶ 10,703 (D. Or. 1975), the plaintiff union sought, *inter alia*, reinstatement of an employee discharged in violation of a collective bargaining agreement in a § 301 suit. The court granted a motion to strike those portions of the complaint that sought equitable relief, concluding that the Norris-LaGuardia Act prevented such relief. We reach the same conclusion.

Even if the Norris-LaGuardia Act did not prevent the grant of specific performance, traditional principles of contract law would. The ordinary rule is that employees are not entitled to specific performance against employers who, by discharging them, breach employment contracts. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1023 n.34 (1st Cir. 1979); D. Dobbs, LAW OF REMEDIES § 12.25 at 929 (1973); RESTATEMENT OF CONTRACTS § 379, illustration 2. The traditional justifications for refusals to award specific performance are applicable here. First, an

award of damages can adequately compensate plaintiffs; they have admitted as much before the District Court (App. 109, 453-54). Second, a grant of specific performance could require the courts to supervise the employer/employee relationship over the length of plaintiffs' lifetime, a task for which the courts are poorly suited. Third, because there is not enough printing work to occupy both the Enquirer's printers and plaintiffs, a grant of specific performance would lead to considerable waste. Each of these considerations supports a denial of plaintiffs' belated claim of a right to specific performance.

B. Mitigation of Damages

The District Court held as a matter of contract law that plaintiffs need make no effort to mitigate damages. It decided that their need to remain available for a possible recall made seeking and holding any alternative job too difficult. We conclude, however, that this case does not fall within the narrow exceptions courts have created to the nearly universal requirement that plaintiffs mitigate damages.

The mitigation requirement is embedded in both labor law and contract law. The general rule in labor law, developed primarily in cases in which discharged employees seek backpay, is that

> an employee must at least make reasonable efforts to find new employment which is substantially equivalent to the position [he lost] . . . and is suitable to a person of his background and experience.

N.L.R.B. v. *Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972) (citations and original emphases omitted). *See N.L.R.B.* v. *Southern Silk Mills*, 242 F.2d 697, 700 (6th Cir. 1957). The rule in contract law is the same, *see, e.g.* D. Dobbs, Law of Remedies § 12.25 at 925 (1973); its justification, as described by Professor Corbin, is that a contrary

rule would involve "unreasonable economic waste." Corbin on Contracts § 1041 at 260. In both contract and labor law, the burden of proving a failure to mitigate rests on the breaching employer. *E.g., Madison Courier, supra*, 472 F.2d at 1318; Corbin § 1041 at 261.

Courts have refused to demand efforts to mitigate damages in some contexts, as when the employer has bargained in bad faith. *Food Handlers Local 425* v. *Valmac Industries, Inc.*, 528 F.2d 217, 219 (8th Cir. 1975). In the present case, however, while it is clear that Scripps has breached its agreement with its printers, there is no allegation and no evidence that the negotiation of the agreement involved bad faith. Nor is it sufficient to argue, as do plaintiffs, that demanding mitigation will encourage future breaches of similar agreements. The same can be said of any case in which mitigation of damages is required.

It is clear that determining, through application of a mitigation rule, the proper damage award for future as well as past injuries will not be a simple task. And we decline, at this point, without benefit of factual findings or any analysis of the legal issues by the lower court, to fashion applicable rules in the abstract. Though difficult, the problem should not prove unmanageable. As the Supreme Court noted in *Pierce* v. *Tennessee Coal, Iron and Railroad Co.*, 173 U.S. 1 (1899), where it held that a discharged employee could recover damages for breach of a lifetime employment contract,

> [t]he difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater in this action of contract, than they would have been if he had sued the defendant, in an action of tort. . . .

173 U.S. at 16. The Court further noted that in figuring such damages, deduction should "of course" be made for any sum the plaintiff "might earn in the future." *Id.* Conscious of the infeasibility of monitoring a month-by-month or year-by-year assessment of damages yet aware of the difficulties inherent

in calculating future damages, we remand for analysis and application of principles of mitigation that will adequately compensate plaintiffs as they vindicate the public policies of federal labor law. *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 192-98 (1941).

IV. THE TORT CLAIM AGAINST THE ENQUIRER

Plaintiffs argue on appeal that the District Court erred in granting summary judgment against them on their tort claim against the Enquirer. They argue that the Enquirer tortiously interfered with their Scanner Agreement contract rights by negotiating a provision in the joint operating agreement that provided that "the Enquirer, using its own employees and not employees of Scripps-Howard or the Post, shall . . . perform all operations . . . involved in producing" the newspapers. The court below concluded that the contract between the Post and the Enquirer would "as a practical matter . . . prevent the Post from carrying out its contract with the printers," and that the Enquirer knew it would have that effect (App. 579). The court found, however, that there was "no shred of evidence in this case, nor could there be, that there was any personal animosity on behalf of either contracting party toward the printers" (App. 579). It held that under Ohio law the advancement of bona fide economic interests privileges any interference not tainted by unlawful means and concluded that "there is no question of material fact but that the Enquirer had an economic interest which it was advancing . . . by means lawful in themselves. . . ." (App. 583). We hold, as did the court below, that the Enquirer is not liable to plaintiffs. We reach that conclusion, however, by reasoning somewhat different from that adopted by the District Court.

The structure of the tort of interference with contractual relations is incompletely outlined in Ohio case law, which governs plaintiffs' pendent claim. The most recent treatment

of the problem by an Ohio Court of Appeals indicates that the state has adopted the framework set out in the Restatement of Torts. The principle of such actions is that

> one who, without a privilege to do so, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship with another, or perform a contract with another is liable to the other for the harm caused thereby.

Juhasz v. *Quik Shops, Inc.*, 55 Ohio App. 2d 51, 379 N.E.2d 235, 238 (1977), *citing* Restatement of Torts § 766 (1939). The guidelines for determining whether a privilege exists are set out in the Restatement as well. The factors are

> (a) the nature of the actor's conduct,
>
> (b) the nature of the expectancy with which his conduct interferes,
>
> (c) the relations between the parties,
>
> (d) the interests sought to be advanced by the actor and
>
> (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

379 N.E.2d at 238-39, *quoting* the Restatement of Torts § 767 (1939). The Restatement (Second) of Torts would add consideration of the actor's motive to the list. It is clear in Ohio, however, that malice, in the sense of "personal ill will, spite, or hatred" on the part of the interferor is not an essential element of the cause of action. *Reichman* v. *Drake*, 89 Ohio App. 222, 100 N.E.2d 533, 537 (1951). And it is clear that "malicious inducement [is not to] be inferred from the mere fact that a third party enters into a contract with one of two contracting parties with knowledge" of the existing contract. *Horth* v. *American Aggregates Corp.*, 35 N.E.2d 592, 599 (Ohio App. 1940).

In challenging the District Court's grant of summary judgment against them, plaintiffs argue as a threshold matter that disputed issues of material fact render summary judgment inappropriate. The traditional rule, as set out in *Smith* v. *Hudson*, 600 F.2d 60, 63 (6th Cir. 1979), *cert. dismissed*, *Hudson* v. *Smith*, 444 U.S. 986 (1979), is that summary judgment is appropriate only when the movant demonstrates conclusively that there exists no genuine issue of material fact, all evidence and inferences drawn therefrom having been construed in the light most favorable to the opposing party. As noted in that case, "cases involving questions of motive or intent are normally not suited to disposition on summary judgment." *Id.* at 66.

As suggested by negative implication in the quoted language, however, and as explicitly noted by commentators, *see* 6 Pt. 2 Moore's Federal Practice ¶ 56.17[1] at 690, no issue is immune from summary judgment. We conclude that neither of the alleged areas of material disputed fact identified by plaintiffs should prevent its grant in this case. Whether the Enquirer acted out of malice toward plaintiffs, one area of dispute plaintiffs identify, does not prevent the grant of summary judgment. While the Enquirer does not deny that it was aware of Scripps' contractual obligations to its printers, no reasonable argument can be built on the claim that its negotiation of the joint operating agreement was motivated by spite or ill will against parties with whom it had never dealt. No evidence of such malice appears in depositions already taken, and no purpose would be served by considering further evidence on the issue. Nor, we conclude, would any purpose be served by further development of such evidence as which newspaper first approached the other on the possibility of conducting joint operations, or which newspaper held the balance of bargaining power, or how firmly the Enquirer insisted on its right to employ its own printers. We assume in reviewing the grant of summary judgment that the Enquirer did negotiate from a superior bargaining position and

did use its bargaining power to exact from Scripps the right to employ its own printers. We conclude that a weighing of the factors Ohio courts have identified as significant must lead to a conclusion of no liability in tort for the Enquirer's actions.

An analysis of the factors identified by the Restatement of Torts and by Ohio courts as being significant to a determination of tortious interferences with contract supports the conclusion of no liability on the part of the Enquirer. Two factors are salient. The first is the clear absence of malicious intent on the part of the Enquirer; its purpose seems clearly to have been the avoidance of the burden of the Post's contractual obligations rather than the deprivation of plaintiffs' rights. Had Scripps been able to provide plaintiffs with other employment, the Enquirer's interests would have been equally served. Given its legitimate desire to use labor efficiently, the Enquirer was effectively faced with a choice between its own and Scripps' printers. The second and more significant justification of the actions taken by the Enquirer derives from the wider social interests they serve. As declared by Congress "[i]n the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts" of the country, "the public policy of the United States [is] to preserve the publication of newspapers in any city, . . . where a joint operating arrangement [is] entered into because of economic distress. . . ." 15 U.S.C. § 1801. Again the issue is not whether the Enquirer's motives were altruistic; presumably they were not. But we are nonetheless hesitant to impose liability on it and for an act consistent with so clear a statement of congressional purpose.

V. SUBSTITUTE PRINTERS

A. Claims of Eight Substitutes

The claims of the eight substitute printers discharged by Scripps, like the claims of the full-time printers, rest upon the Scanner Agreement and the collective bargaining agreement negotiated in 1976. Beyond that the claims have little in common; neither the Scanner Agreement nor succeeding collective bargaining agreements treat substitute printers and full-time printers alike. The Scanner Agreement provides, in pertinent part, that

> The Post guarantees that all substitutes listed by name . . . will be offered five days work per week for the time period from June 10, 1974 to February 29, 1976, and will receive all Contract Benefits . . . as applies to situation holders.

(App. 66). The February 29, 1976 deadline was the expiration date of the underlying collective bargaining agreement setting terms and conditions of employment. It is undisputed that Scripps fulfilled the terms of that obligation. On November 24, 1976 the printers' union signed a renewal of that collective bargaining agreement, retroactively effective from March 1, 1976 until 1981. That agreement has already been discussed at some length, and it provides, without special reference to the substitute printers, that the Scanner Agreement, with exceptions not relevant here, "remains in effect" (App. 96).

In granting summary judgment against the substitute printers, the District Court concluded that the "remains in effect" language in the 1976 agreement could refer only to "obligations not theretofore fully performed" and could have been intended only to insure the survival of unperformed obligations. Although the interpretation of the language adopted by the District Court is most likely the appropriate one, we conclude that the language is not so unambiguous as to justify

the issuance of summary judgment against the substitute printers.

In deciding the issue, we, of course, observe the traditional rule that summary judgment is appropriate only when the movant demonstrates conclusively that there exists no genuine issue of material fact, all evidence and inferences drawn therefrom having been construed in the light most favorable to the opposing party. *Smith* v. *Hudson*, 600 F.2d 60, 63 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979). Although the question of whether the language of a written agreement is ambiguous is one of law, the interpretation of such language, once held to be ambiguous, is a factual issue turning on the intent of the parties. Wright & Miller, Federal Practice and Procedure: Civil § 2730, pp. 584-87. As such, it is an issue not susceptible to disposition by summary judgment on the basis of the present record. *E.g.*, *id.* at 584; *Aetna Casualty & Surety Co.* v. *Giesow*, 412 F.2d 468, 471 (2d Cir. 1969); *Cram* v. *Sun Insurance Office, Ltd.*, 375 F.2d 670, 674 (4th Cir. 1967).

The meaning of the relevant language in the 1976 collective bargaining agreement is sufficiently ambiguous to warrant further factual inquiry; the interpretations set out by both the substitute printers and Scripps are plausible ones. The deposition testimony and other evidence offered by the parties thus far is inconclusive. Deposition testimony offered by the substitute printers to the effect that Scripps continued to offer them five days of work per week is consistent with their claim but not dispositive of Scripps'. An affidavit relied upon by Scripps states the terms and applicable dates of the guarantee of the Scanner Agreement but asserts nothing as to its possible extension (App. 192a-b).

B. Claim of Raymond P. Hughes

Plaintiff Raymond P. Hughes occupied a unique status. Approximately one month before the execution of the Scanner Agreement, he was discharged for cause from his position as

a full-time printer. His name was nonetheless included in the Scanner Agreement's list of full-time printers, apparently because arbitration proceedings for his discharge were still pending. Eventually the discharge was upheld in arbitration. One explicit exception to the Scanner Agreement's guarantee of employment for full-time printers is terminations for just cause, and Hughes accordingly makes no claim as a full-time printer. He argues, however, that because he was entitled to maintain and did maintain the status of substitute printer following his discharge as full-time printer, he is therefore entitled to whatever rights the Scanner Agreement and succeeding collective bargaining agreement provide to substitute printers. The District Court rejected that argument and granted summary judgment against him. It concluded that the reason for the inclusion of Hughes in the list of regular situation holders was clearly the pendency of the arbitration proceedings, and that once Hughes lost the rights of a regular situation holder he lost all rights the Scanner Agreement might otherwise have provided him.

We again conclude that the issue is not so clear as to justify disposition by summary judgment, relying on grounds analogous to those set out in our discussion of the claims of the substitute printers. Both parties' interpretations of the rights the Scanner Agreement provides to Hughes are plausible. Hughes claims, and Scripps has not denied, that he was entitled to become and did become a substitute printer following his termination as a full-time printer. If that is so, the failure of the Scanner Agreement to include him on the list of those entitled to the lesser rights of substitute printers would seem to be an accident of the timing of his arbitration proceeding. If so, the denial to him of the rights of substitutes would seem to be contrary both to notions of fairness and to the probable intent of the parties drafting the Scanner Agreement. Scripps has submitted nothing that would establish the contrary. An affidavit submitted by its agent notes the fact of Hughes' termination as a full-time printer and states that he

"subsequently 'slipped up' as a substitute printer at the Post, and holds that position today" (App. 192b). The phrase "slipped up" is probably one to which the parties attach a precise meaning; that meaning, however, does not appear in the record.

Accordingly, the decision of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. C-1-77-767

BERNARD J. HEHEMAN, *et al.*

Plaintiffs

v.

HONORABLE GRIFFIN B. BELL
Attorney General of the United States, *et al.*

Defendants

MEMO ON PENDING MOTIONS

(Filed November 28, 1979)

Preliminary

Pending in this case (probably among some others) are the following motions:

I - by plaintiffs

a) Motion for Partial Summary Judgment against Defendant Scripps.

II - by defendant Scripps

a) Motion for Summary Judgment

b) Motion for Partial Summary Judgment

c) Motion for an Order Adding Party

d) Motion for an Order Denying Plaintiffs' Motion for, etc. Injunctions

e) Motion for a Declaration of Obligation to Mitigate.

The various motions have been fully briefed.

Disposition

II-d is moot. At an interim pretrial, plaintiffs, in effect, withdrew any prayer for any injunction (and that withdrawal was confirmed on the record at that pretrial, even if the standing ruling of this Court (Doc. 38, p. 13 through 16a) 16 March 1978 were reconsidered and the Court were to hold, as this Court then presently would have done, that the plaintiffs, while lacking antitrust money damage standing, do have antitrust injunction standing). Being moot — for the record II-d is granted.

I-a is granted in part — see II-b and -d below.

II-a is denied.

II-b is granted.

II-c is denied.

II-e is denied, conditionally.

FACTS

There are no material facts in dispute. Most of the basic relevant facts are set forth in two Memos of this Court, i.e.:

Docket No. 15 — 1/23/78
and
Docket No. 38 — 3/16/78

"Repetitio" is the "Mater" of "Studiorum" but not the judiciary today — adoption and incorporation by reference is preferable, if not dictated by temporal necessity.

We add these:

1) At long last the Attorney General has disposed of the application for an approval of the joint operating agreement. It was so approved on November 26, 1979, (effective 12/6/79) and judicial notice is taken of that. If the parties prefer to augment this record by stipulation, that is O.K.

2) Scripps' repudiation of Scanner is effective — at least for declaratory judgment purposes.

3) For reasons (some irrelevant to this memo) the number of plaintiffs has been somewhat reduced to approximately one hundred and nineteen.

4) The negotiation of the collective bargaining agreement effective March 1, 1973 through February 29, 1976 between the Cincinnati Newspaper Publishers Association and the Union concluded with the prospect for further negotiations between the Union and the Post during the term of that agreement. The anticipated subjects of the midterm negotiations were the Post's introduction of new technology in the composing room and job security. By letter agreement the parties — Union and Post — committed themselves to negotiate those subjects and, as the trigger for such negotiations, the Post obligated itself to give timely notice to the Union of the Post's determination to introduce new technology. The Enquirer had made such a determination earlier and had concluded a separate agreement with the Union on those issues.

5) By letter dated September 14, 1973, Tom Conlon, the Post's Director of Labor Relations, notified the Union of the Post's intention to install new technology ("scanners") in the composing room. Following that notification, negotiations began which did not conclude until June of the following year with the execution on June 10, 1974 of the "Letter of Understanding Between Cincinnati Typographical Union No. 3 and the Cincinnati Post & Times-Star." (Scanner Letter) From the date of the Conlon letter to the execution of the Scanner Letter, the subject of joint operations or their impact on plaintiffs' future employment never arose; the focus was solely upon use of the Post's new mechanical electronic composition system and the impact of the new system on composing room employees.

6) The Scanner Letter of Understanding — it more or less speaks for itself.

7) The Scanner Letter opens with the following explicit reference to the context out of which it arose:

> Under Section 2, paragraph (d) of the Jurisdiction Provision of the Contract between the Cincinnati Daily Newspaper Publishers Association and Cincinnati Typographical Union No.

3 effective March 1, 1973 through February 29, 1976. The Cincinnati Post and Times-Star has proposed that a mechanical-electronic composition system be introduced into the composing room and has proposed to set up appropriate programs for training and retraining of Union members assigned to work with such system. The Union has proposed provisions for job security, retirement or severance benefits and a union shop clause.

8) The Scanner Letter by its express terms was interrelated to and with the collective bargaining agreement then existing and any succeeding agreements that would be reached between the Union and the Post. It contains nothing with regard to wages, hours and working conditions, all such critical subjects being expressly left to the principal labor/management agreement.

9) At the conclusion in June of 1974 of Scanner Letter negotiations, the Post employed as "regular situation holders" approximately two hundred and twenty-one printers whose names appeared on the priority list dated May 1, 1974. (Included on that list are all plaintiffs still parties to this case.) Each of those individuals possessed precisely the same rights as the plaintiffs. Approximately forty-two such individuals took advantage of the "buyout" provided (a maximum of $10,000.00) under the "Retirement and Severance Benefits" payment provisions of the Scanner Letter. The composing room "work/force" was reduced by March of 1976 to approximately one hundred seventy-seven regular situation holders.

10) In 1976, during the pendency of negotiations over a new collective bargaining agreement, the Post demanded a further reduction in force of 57 printers. It offered to "buyout" the reduction demanded for $10,000 per regular situation. The Post and Union agreed that the work week in the composing room would be reduced to four days until the reduction of force was achieved. By August of 1976, 32 printers left the Post's employ as the result of the buyout. In August, following additional negotiations, the Post raised the buyout to $15,000.00 and the work force was reduced to approximately its present level — less than one hundred twenty regular situation holders.

11) The Basic Labor Management Contract was negotiated and agreed upon (1976) as effective from 3/1/76 to 2/28/81. Rates of pay as prescribed therein vary (with time, etc.) from a low of $302.35 per week to a high of $348.85 per week (basic — subject to certain renegotiation). The new 1976-81 collective bargaining referred to the "Scanner Agreement" and affirmed that the Scanner Agreement still "remains in effect."

12) It is emphasized:

a) *Each* of the plaintiffs was specifically named in the Scanner — and described as on a "list" — and Scripps' agreement was to extend to each on the list (and named) continuous employment for the rest of (their) *his* working "life."

b) One should balance the "buyout" price ($10,000 - $15,000) with the annual wage (for our purposes $15,000 and up). That should ring a *bell* in solving this dispute — the practicing parties are knowledgeable far beyond advocates and judges.

DECLARATORY

The amended complaint seeks a "declaratory judgment" — the defendants' plenary motion seeks "partial declarations." In this Memo the Court proposes to attempt to supply the relevant declarations. We leave proposals of concrete judgment(s) to counsel, at least preliminarily and hope that, for once, they will "get along" as reasonable people can and should (assuming separation from emotions).

CONCLUSIONS

Again preliminarily — this is a unique case. It is somewhat complex, per se — and surely so when considered in conjunction with the Preservation Act proceeding (administrative and [to come] judicial). All admit is a "unique situation." It sure is.

The conclusions of this Court will be stated as simply as our limited ability permits and without citation of any authority. These are the reasons:

a) It was our good fortune — a la '31 — to cub for a nationally famous lawyer named Judge Robert S. Marx, now deceased. His

teachings included this one: "One may advance any *possibly* plausible statement of law and then find express precedent for it in the books — if one looks long enough — so brief for me *this proposition* (?) [you pick your own] in *this context*."

In 1931 the reported actions of all the lower federal courts over a span of the previous century and a half were reported in a total of about 360 volumes (Fed. and first few volumes of Fed. Second). Since then F.2d has gone to about 590, F.Supp. to 470+ and F.R.D. to 81.

If one could — as one sure could in 1931 — find support for the possible plausible in 360 volumes, just think how easy it is today to find them on either side of the proposition when one has at least 1100 more books (in just one-third the time) dealing with only one set of courts.

b) Appellate courts used to extend some regard for trial courts' conclusions. That, too, went "with the wind" (circa 1950). "Findings" survived until about 1965. So why cite?

c) The briefs of the parties have them all — pro and con. The interested are free to look.

-1-

This is a 29 U.S.C. 185 case. We deal here, of course, only with the issues posed by Count II — Printers v. Scripps — contract count.

-2-

The Scanner Agreement is an employment contract — while not bilateral in the sense that the Printers did not agree to work for "their working lives," the context provided adequate consideration.

-3-

The Post is not ceasing business — the relevant business is getting out a newspaper.

-4-

It is somewhat shocking to this Court that a supposedly responsible organization like Scripps could (a) secure labor peace and advance its productivity by passing to a named person a written promise (in exchange) to employ him for "the remainder of his working life as a printer" and (b) turn around the next day to a 50-year-old printer in good health and say its, Scripps', written promise meant *NOTHING* (the right to Impact Negotiations he *already* had, i.e., the printer did *without* Scanner).[1]

-5-

Whether or not Scripps is entitled to a Preservation Exemption is a question irrelevant to this case for decisional purpose. It belongs for such purposes strictly in the Administrative (past) and judicial (under Ad. Pro. Act — to surely come). Congress has so committed it and the law of primary jurisdiction (established in the I.C.C. vs. Fed. Trial Court cases) so "sembles." See, for example, *Southern Railway v. Combs*, 484 F.2d 145 (6th Cir. 1973).

-6-

That is particularly true as applied to a party (such as the plaintiff-printers) who are in fact parties to the Administrative proceeding and have Administrative review rights. Any claim such a party had to a "jury" for a contract and/or antitrust fact questions was waived or barred when the party voluntarily and on his (their) motion becomes party to the administrative proceedings.

-7-

The doctrine of collateral estoppel also applies if need be and the findings and conclusions of the Administrative Law Judge and Attorney General are binding on the plaintiffs and Scripps in this case — at

---

[1] Perhaps one should hasten to observe the obvious — the "it means nothing" decision was in no respect the decision of the officers of the Cincinnati Post & Times Star — it was the decision of the Scripps Executive Office.

least during any interim and until such be modified in an appropriate administrative review (judicial) proceeding. We are not now confronted with the effect of a future modification — no use crossing that bridge until one gets there. Bridges — at least one — are causing enough trouble in enough places already.

-8-

"Life" or "live" are not words of fixed arbitrary meaning. For example — a federal court sentence of a defendant "on Count I, for life, on Count II, 10 years, *consecutive*" is a *legal* sentence. Any "fool" knows[2] your natural "life" terminates with "death" and you cannot serve a temporal sentence in a federal prison for ten years after you die. How come all this? To the curious see 18 U.S.C.A. 4205 and related sections.

Again, "working life" is not uni-meaning — one cannot tell puristically what it means. Up until recently it was axiomatic that life began at conception. Some years ago the axiomatic was redefined by the *temporal* Supreme Court — and many, many think that was automatically reversed by THE SUPREME COURT. The point is — if you cannot tell when "life" starts, who is so sure when "working life" ends or is terminable, judicially?

We daily say, "You saved my life." We mean dozens of different things, depending on context. (See Addendum "A".)

-9-

The "Scanner" is a third-party-beneficiary contract and gave employment rights to "working life" employment in its context. Of course, most [99.9999%] collective bargaining agreements are *not* employment contracts. You do not find "I will employ you" in them. It is in "Scanner."

---

[2] ? !

-10-

A third-party-beneficiary contract may be enforced by the *named* beneficiary. He has personal, legally recognized, rights. Why else did Scripps put his personal name in the Scanner? This Court is "disturbed" [3] by the claim that this case is "arguably" within the jurisdiction of the N.L.R.B. — particularly in the light of the substantiality of the defendant claimant.

-11-

The negotiator of a third-party-beneficiary contract is *not* (and never was) a necessary party to an action by the beneficiary to enforce it. That is true under Ohio law — and under basic federal law. That is not to say that the contractual right of Union-Scripps to negate has not been observed.

-12-

The "economic strike" — 2 vs. 2 — argument is completely rejected. What force does a "striker" have whose employer wants to fire forever!

-13-

Courts should enforce contracts to the limit of the obligations assumed. However, a court cannot write one or expand on it. A court may and should construe the language of a contract written by the parties or their agents so as to wind up with a meaning capable of judicial enforcement. That is good morals and therefore good law.

-14-

We cannot resist noting that the position of the parties on the question of —

a) parol evidence to aid construction and/or

---

[3] Meaning — these litigants have already "enjoyed" (?) one administrative proceeding for some two years. The desire for another disturbs an observer.

b) meaning comes from context and surrounding circumstances vis-a-vis each other in this case each changed 180° from the start of this case until submission. "Unique" cases are accompanied by "unique" advocacy.

-15-

The term "working life as a printer" means prima facie just what you and I understand it to be — it means you, continuing in health required to be an effectual printer, have a job with me until you are about 65.

-16-

However, in its overall context in this case, which includes

(a) the cross-referencing and the inter-se-se vis-a-vis the collective bargaining contract, and

(b) the concrete construction of the parties — the buyout history and amounts involved,

(c) the fact that the quid pro quo for "working as printers," i.e., wages, was written by the parties in a manner determinable only to the end of the collective bargaining agreement(s) "in esse" and "in futuro,"

the term "working life" was meant or defined or contemplated by the parties to mean "until the termination of your working life" or "until the termination of the existing collective bargaining agreement and/or any renewal or renegotiated one," whichever comes first.

-17-

"Life" employment contracts, unless expressly bilateral in the "life" obligation, are not favorites of the law. The monkey is only on the back of one party and that is the reason.

-18-

Even though unenforceable in linguistic toto, contracts should be enforced to the extent consistent with the solemn writings of the parties.

-19-

To enforce beyond March 1, 1981 would be judicial contract writing and not judicially acceptable.

-20-

"Impact negotiations" are not dealt with by this Court. Whether the printers still have (cumulatively) "impact" rights we leave to the proper judge, the N.L.R.B. That is a labor law question — whether the third party beneficiary rights displace "impact" rights — this Court expresses no opinion on it — is none of our business.

-21-

The employer Scripps must pay the printers weekly the wages as provided in the present collective bargaining agreement until its termination on March 1, 1981. Detail is for the Committee provided for in the Scanner and we go no further.

-22-

The ordinary *contract* damage rules applies — difference between the value of what one got and the contract value.

-23-

Plaintiffs suggested damage rule — O.K. in a *tort* case. This is not a tort case and the rule is rejected.

-24-

The plaintiffs need *not* mitigate. They need not seek or accept other employment. If they do and receive remuneration, the remuneration (interim — 3/81) is a credit on a person-by-person (individual printer) basis.

-25-

Context requires this mitigation rule. A person seeking employment usually must commit for some temporal period. For another thing, this Court has *no* idea what, if any, status quo injunctions or stays may be granted in the judicial review proceeding and/or if any

should be filed. To require a mitigation under the peculiar situation which could put a printer in a position of not being able to answer a "recall" — if one comes — and thereby lose his rights and leave the employer off the hook is unreasonable and illegal.

-26-

It is the memo declaration that the defendant Scripps is obligated to pay each of the about 120 plaintiff printers wages as set forth in the present collective bargaining agreement and in accord with its terms and on a weekly basis promptly and under the terms of the Agreement (including Settlement of Disputes) until March 1, 1981 and that the plaintiff printers are *not* required to mitigate.

Within ten days the parties may settle and present a proposed judgment (declaratory) in accord herewith and dispositive judgment with respect to counts 1 and 3 and the counterclaim. If the parties cannot settle, each may present its own proposal within fifteen days from now.

Costs — as between plaintiffs and Enquirer —
each to pay his own,
as between plaintiffs and the United States —
no award,
as between plaintiffs and Scripps —
Scripps to pay.

SO ORDERED.

/s/ _____
United States Senior District Judge

ADDENDUM

The most glaring example of the legalistic and judicial elasticity of the terms "life" and its antithesis "death" did not occur to this Court until it was prompted by a reading of "The Editor's Notebook" in the Cincinnati Post Saturday, November 17. The term of an American marriage contract traditionally is a *(verbatim)* "til death" or "during life."

What does that simplicity mean as legalistically and judicially construed?[1] In some states it means until one "partner" gets tired, shall we say, of the other's hairdo — "life ends by unilateral fiat." In some states it means "until some one of us gets enough money out of the other" or "until some one of us gets enough money to get a Mexican lawyer and a Spanish decree." In some it means "until we sign something agreeing our lives have terminated and file it in a courthouse." In some it means "until a court decrees otherwise" and so on, ad nauseum.

To the legalistic a Roget which would follow "working life" with "March 1, 1981" would scarcely raise an eyebrow.

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[1] Joke: "Tortured" is better.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. C-1-77-767

BERNARD J. HEHEMAN, *et al.*

Plaintiffs

v.

HONORABLE GRIFFIN B. BELL, *et al.*

Defendants

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT

(Filed August 14, 1979)

The defendant Cincinnati Enquirer has moved under Rule 56 for a summary judgment in its favor, dismissing the third claim of the plaintiffs, i.e., the pendent claim, on the ground that there is no genuine issue as to any material fact and that the Enquirer is entitled to judgment as a matter of law. The motion is well taken and should be and is sustained.

The defendant Enquirer previously and very early in this "premature?" litigation moved to dismiss the pendent claim, Count III. The burden of the defendant in respect of a motion to dismiss is even heavier than on a motion for summary judgment. The motion to dismiss was denied on March 16, 1978. One purpose was to extend to the plaintiffs the maximum opportunity for discovery to develop the semi-conclusory factual allegation of malice. The background facts involved in the present motion for a summary judgment, or perhaps more accurately stated, the basic facts involved are set forth in this Court's disposition of that and other motions to dismiss (3/16/78) and it would serve no useful purpose to repeat them.

The burden of the defendant Enquirer in respect of this motion for summary judgment has been recently set forth by the Sixth Circuit in *Smith* v. *Hudson*, (June 21, 1979). That burden is to show "conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." We repeat that the plaintiffs have had every opportunity for discovery and have exhausted the opportunities.

The plaintiffs' sole developments claimed to warrant inferences sustaining an action may be summarized as follows:

1) The Enquirer coveted the Post and initiated the negotiations. In this country competitors still covet each other and it is irrelevant to any question of malice or privilege. In Cincinnati, Scripps (this Court, for purposes of this case, refers indiscriminately to Scripps and the Post) at one time coveted the Times-Star and its editor, in a case on the dockets of this Court, described the effort in satisfaction as a "war." See *Associated Press* v. *Taft-Ingalls*, 340 F.2d 753 (6th Cir. 1965).[1] As the record of this Court also shows, Scripps not only coveted but at one time, for practical purposes, acquired the Enquirer and the United States did not like that — so, competitor newspapers do covet each other and the actions pursuant thereto are irrelevant to malice or privilege. In short, the inference claimed by the plaintiffs may be justified but it does not help the plaintiffs.

2) The contract between the Post and the Enquirer, if authorized, will ipso facto — as a practical matter — prevent the Post from carrying out its contract with the printers. The Enquirer knew this at the time the conditional joint operating agreement was entered into.

3) The contract itself is directed at the plaintiff printers and the direction was at the insistence of the Enquirer.

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[1] A case which, generally speaking, we would just as soon forget.

This Court has difficulty separating 2 and 3 as a practical matter, so it deals with them together. We assume, without deciding or concluding, that the plaintiffs are right in saying that the contract does in fact — if the condition be removed — prevent the Post from employing the plaintiffs as printers for the plaintiffs' lives. However, there is no shred of evidence in this case, nor could there be, that there was any personal animosity on behalf of either contracting party toward the printers. [2]

The thing to remember about the legal significance from a tort point of view of any asset type or business performance type of any consolidation or merger or similar business action is this: It is practically impossible to accomplish an asset type, etc., consolidation or merger or joint action without doing just that. There is scarcely any type which does not in fact prevent the selling party from performing some of its contracts and any rule that would make a buyer liable for such a result would certainly discourage, if not prohibit, all kinds of activity countenanced by law since businesses merged. It may well be that the law should intervene if in accomplishing the consolidation, etc., means are used which are forbidden by law, such as the use of economic force forbidden by the antitrust laws. There is no evidence at all of any such in this case. The word "tie" is nowhere used in the briefs vis-a-vis the purchase of the old Times-Star Building by the Enquirer. Nor could it be, in view of the facts apparent now on this record. So, this is not a case in which the inevitable result of joint action or consolidation was accomplished by means forbidden by law. The Enquirer did nothing that it did not have a legal right to do. Incidental damage resulting to individuals from the exercise of a legal right is commonplace in our society.

Finally, while the contract does on its face fairly well prohibit the Post printers from obtaining jobs with the Enquirer except through standard Union practices — or stated otherwise, reserves the work to Enquirer employees — the answer is really, "So what." Whenever two entities combine and have more capability than the result is going to require, they generally cover what is going to happen in their

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[2] Under Ohio law, even that is more relevant to damage than liability.

contract and one gets it and the other loses it. That is commonplace too. Further than that in this situation, one can readily understand why the Enquirer did not want to get any of the plaintiff printers in its employ as a result of a contract and then face a claim that the Enquirer had adopted the Scanner Agreement. As this Court sees it, the provisions in the contract relied on by the plaintiffs in this respect were simply demanded by the existence of the Scanner contract, the type of consolidation being agreed on and commonplace legal draftsmanship.

So much for the facts.

It is a temptation sometimes to write in some detail in a situation such as this. The claim is, of course, a pendent one. This Court is bound by the law of Ohio. The Restatement works have dealt at length with the law involved in this case under the heading "Intentional Interference With Performance of Contracts." While we refer to the Restatement for purposes of pointing out the multiple questions involved in such a claim, this Court proposes to deal only with one. The one with which we deal is this: If unlawful means are not used, there is a privilege which rests on a bona fide economic advancement interest of the defendant against whom the claim is asserted. While, as we should have said, the Supreme Court of Ohio has not dealt specifically with this and others of the questions involved, the Ohio Courts of Appeal have, as have the Ohio Common Pleas Courts. The reported cases in Ohio, without exception, refer to this privilege. They have uniformly concluded that lacking the use of unlawful means, or violating a contractual obligation to the contrary, a person not a party to a contract is not liable for damages for its breach on the ground that they aided or abetted or encouraged or caused a party to the contract to breach it — and — there is no question about that in a situation in which a defendant in causing a party to breach was advancing a legitimate interest, economic or otherwise, of such person. In this Court's view the Ohio cases which warrant that conclusion or those conclusions are: *Horth* v. *American Aggregates*, 31 Ohio L. Abs. 331 (2nd Dist. Darke Co. Court of Appeals, 1940); *Akron Milk Products* v. *Lawson Milk Co.*, 77 Ohio L. Abs. 275 (Summit Co. Common Pleas, 1958); *Pestel Milk Co.* v. *Model Dairy Products Co.*, 39 Ohio L. Abs. 197 (Ohio Appeals 2d Dist., Franklin

Co., 1943); *Pearse* v. *McDonald's* 47 Ohio App. 2d 20 (Franklin Co., 1975); *Reichman* v. *Drake*, 89 Ohio App. 222 (Hamilton Co., 1951); *Petty* v. *Dayton*, 79 Ohio L. Abs. 292 (Common Pleas, Montgomery Co., 1958). Compare, *Sayre* v. *United States*, 45 O.O. 2d 289 (USDC N.D., Ohio, 1967); *Leibovitz* v. *Bank*, 75 Ohio App. 25 (Cuyahoga Co., 1944). This comment about the *Leibovitz* case — no possible question of privilege was involved.

From either a viewpoint of being bound by the Ohio Courts of Appeals decisions or from a viewpoint of surmising what the Supreme Court of Ohio would do with the question based on all the Ohio authorities, this Court would conclude and does that there is no material question of fact but that the Enquirer had an economic interest which it was advancing or trying to advance by means lawful in themselves; that any interference is therefore incidental, or as the Latins used to put it, "damnum absque injuria."

It is the purpose of this Order simply to sustain the Enquirer's motion. This is not a judgment. No judgment will be entered pursuant to this conclusion until the entire case may be disposed of in one overall judgment.

/s/ _____
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. C-1-77-767

BERNARD J. HEHEMAN, *et al.*

Plaintiffs

v.

HONORABLE GRIFFIN B. BELL, *et al.*

Defendants

MEMORANDUM ON MOTIONS TO DISMISS

(Filed March 16, 1978)

Before the Court are various motions to dismiss each and all of the claims stated in the amended complaint.

The allegations of the amended complaint must, of course, be accepted as true and must be construed reasonably in favor of the assertions of the plaintiffs.

A summary of allegations of the amended complaint, pertinent to the issues raised by the motions, follows.

The plaintiffs are printers employed by the defendant E. W. Scripps Company (Scripps) at The Cincinnati Post, a newspaper published by Scripps. Plaintiffs are all members in good standing of the Cincinnati Typographical Union Number Three, a local of the International Typographical Union. That organization represents employees in an industry affecting commerce as defined in the Labor Management Relations Act and within the meaning of Section 301 thereof, 29 U.S.C. § 185.

Neither the International nor the Local is a party to this case.

The defendant Honorable Griffin B. Bell is the Attorney General of the United States; defendant Scripps is an Ohio corporation which

publishes the Cincinnati Post; the defendant Cincinnati Enquirer, Inc. (Enquirer) is an Ohio corporation which publishes a morning newspaper bearing that name in the Cincinnati area.

Both Scripps and Enquirer, in connection with their respective publications of the Cincinnati Post and Cincinnati Enquirer, are substantially engaged in interstate commerce and each is an employer in an industry affecting such as defined in the L.M.R.A.

The amended complaint contains three counts. The first count is based on the Sherman and Clayton Acts and the Fifth Amendment. It alleges that on September 23, 1977 Scripps and the Enquirer entered into a "Joint Operating Agreement" by which the Enquirer, using its own employees, would perform all operations (other than editorial and reportorial) involved in producing and distributing both the Enquirer and the Post; the Enquirer would acquire certain substantial assets of Scripps used in printing and publishing the Post; Scripps and the Enquirer would divide the profits from the joint operation according to a predetermined formula and the Enquirer would establish the circulation and advertising rates for both newspapers. It is alleged that the Joint Operating Agreement violates both the Sherman and the Clayton Acts, but that Scripps and the Enquirer seek to avoid the prohibitions of those Acts by obtaining an exemption under the Newspaper Preservation Act, 15 U.S.C. §§ 1801, et seq. (The defendant Scripps, at least, has conceded in this record in connection with some discovery matters that the Joint Operating Agreement, absent an exemption under the Newspaper Preservation act, per se violates the Antitrust Act.) The defendant newspapers have applied to the Attorney General of the United States for his written consent to effectuate the Joint Operating Agreement under the Newspaper Preservation Act. Under that Act the Attorney General shall grant an exemption when he finds "that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that appproval of such arrangement would effectuate the policy and purpose of . . . the Act."

To continue — the first count asserts that the Joint Operating Agreement may be approved by the Attorney General at any time and, upon such approval and by the terms of the agreement, takes effect

within ten days thereafter; that both Scripps and the Enquirer have publicly stated that a direct result of the acquisition of the exemption is the immediate and total destruction of all the plaintiffs' jobs. The plaintiffs assert that the procedural apparatus under which an exemption may be obtained is unconstitutional when tested against the Fifth Amendment for the asserted reason that the determination of whether the parties to the proceeding can satisfy the criteria for an antitrust exemption is an adjucative fact finding process which requires an adversary hearing before an impartial tribunal at which any party affected, such as the plaintiffs, may present evidence bearing on the entitlement to the exemption. In other words, the plaintiffs claim to be entitled to notice and hearing in connection with the proceedings for the exemption.

To digress from the complaint — the Court takes judicial notice of the fact that the Attorney General has recently issued an order for a hearing before an administrative law judge, C.F.R. Title 28:48.10.

To return to the amended complaint — the plaintiffs assert that the contemplated hearing would lack essential elements of fairness and impartiality because the Attorney General's Assistant would participate in an adversary role as a party to such hearing while reserving to the Attorney General the ultimate right to approve or disapprove the agreement, without regard to the findings of fact and conclusions of law of the administrative law judge.

The plaintiffs claim that both the Act itself and the regulations are unconsitutional, that (a) the plaintiffs will be affected through loss of employment if an exemption is granted and therefore have present standing; (b) the plaintiffs will be deprived, without notice and an opportunity to be heard, of the right to secure direct relief from the antitrust impact of the agreement through regular legal recourse. Finally, claiming that the Newspaper Preservation Act itself is unconstitutional, as well as the regulations promulgated thereunder, for the reason stated — the relief sought is an order prohibiting the Attorney General from approving the Joint Operating Agreement and prohibiting Scripps and the Enquirer from implementing it.

A motion for a temporary injunction in accordance with the first count, enjoining the Attorney General from granting the exemption without holding a hearing in which the plaintiffs would be entitled to participate as a party, has previously been made and denied by this Court.

The first count has been referred to throughout this litigation as the "antitrust" count. The second count has been referred throughout this litigation as the "repudiation of collective bargaining agreement" count. The third count has been referred to as the "tortious interference with contractual relations" count.

Turning to the second count, the plaintiffs assert that each of them is a named beneficiary under and is covered by a collectively bargained employment agreement between the Local Union Number Three and Scripps; that Scripps has repudiated such agreement and that the plaintiffs are entitled to a declaration of their rights thereunder, to an order requiring Scripps to perform the agreement or, alternately, to damages. This claim is based on 29 U.S.C. § 185.

In 1974, in order to induce the plaintiffs to relinquish jurisdiction over certain work in the composing room at the Post, Scripps entered into a collectively bargained employment agreement with Local Three, which is described as "The Scanner Agreement." A copy of this agreement is attached to the complaint. Under the agreement, Scripps agreed that the plaintiffs, practically all of whom are named in the agreement, "will be continuously employed for the remainder of their working lives by the Post as printers." The Scanner Agreement also provides that "this job security Agreement shall supersede any and all existing contracts and/or agreements between the Post and the Union for said named employees, and is permanent unless cancelled by mutual agreement" of both the Post and the Union. The Scanner Agreement has never been cancelled by mutual agreement of the parties and remains in effect. The two sections in that agreement which are of particular application to the pending motions are the sections entitled "Job Security" and "Standing Committee," which provide as follows:

JOB SECURITY

The Post. . . . agrees that all regular situation holders and apprentices who will become regular situation holders, as listed in the Post's priority list dated May 1, 1974, will be continuously employed for the remainder of their working lives by The Post as printers, subject to voluntary terminations, voluntary retirements, disability retirements: as prescribed and defined in F.I.C.A. (Social Security Act) and involuntary terminations for just cause, as provided in Section 21 of the Contract. In case a strike, lockout or "Act of God" results in a period of temporary suspension of the employer's composing room operation, the job security will be suspended for such period of temporary suspension of operation only. This Job Security Agreement shall supercede (sic) any and all existing contracts and/or agreements between The Post. . . . and the Union for said named employees, and is permanent unless cancelled by mutual agreement of both The Post and the Union.

During such continuous employment of such an employee by The Post as a printer, he or she will be paid the then applicable wage scale for printers (and covered by any other terms and conditions of employment) which are negotiated and set forth in the existing and any and all succeeding collective bargaining agreements between The Post and the Union.

STANDING COMMITTEE

The parties recognize that the spirit and intent of this Agreement, and the parties fair and cooperative efforts in the proper observance and implementation of its terms and conditions, are very important to both parties. To this end, illustratively, the Union has expressed its members' willingness to assist in and expedite the transition into said mechanical-electronic composition system. Also to this end, illustratively, The Post. . . ., in addition to its commitment to provide the aforementioned job security to certain named printer employees, has assured the Union that in the future it will continue to make composing room job opportunities available to such employees so that they can continue to perform meaningful and gainful work for The Post.

Moreover, it is agreed that the present negotiating committee of Union and the Post representatives, or their designated successors, shall be maintained and continue in operation as a Standing Committee until the expiration of the current Contract

> between the parties on February 29, 1976, for the purpose of meeting at the convenience of the members of the Committee to further discuss, when necessary, the provisions of this Agreement, and to further interpret the provisions contained herein. Thereafter, said Standing Committee shall consist of the President of the Union, and the Chairman and Assistant Chairman of the Post. . . . Chapel of the Union together with three Post representatives, or the designated successors of any of them.

It is not claimed that the Scanner Agreement contained any grievance procedure or arbitration provisions other than the provisions in the Standing Committee section. At the time the Scanner Agreement was entered into there existed a general and basic collective bargaining agreement between the Cincinnati Daily Newspaper Publishers Association (which included the Enquirer and the Post) and Local Union Number Three, which expired in 1976. In 1976 a new contract between those parties, constituting a basic and general collective bargaining agreement between the parties, was entered into and which remains effective until February, 1981. That contract does contain a detailed grievance procedure leading to binding arbitration and further states that the Scanner Agreement "remains in effect."

The second count continues that in October of 1977 Scripps informed Local Three that the Joint Operating Agreement had been entered into and that, upon effective approval under the Newspaper Preservation Act by the Attorney General, the employment of all of the plaintiffs at the Post would be terminated and the composition work of both newspapers would thereafter be performed by printers employed by the Enquirer. The plaintiffs claim that such termination of employment would breach the Scanner Agreement and further that the Agreement has been repudiated by Scripps in making the announcement to Local Three of the contingent terminations. The plaintiffs assert that the plaintiffs sought to arbitrate their claims under the general and basic collective bargaining agreement and the grievance procedure provided for therein, but were informed by Scripps that their claims for breach of the Scanner Agreement are not arbitrable under the general agreement. (The plaintiffs evidently agree that their claims are not arbitrable under the general agreement. The parties differ with respect to whether the provisions of th Scanner Agreement, and specifically the "Standing Committee" provisions, require action by the plaintiffs precedent to seeking judicial relief.)

Alternately, the plaintiffs claim that the repudiation by Scripps relieves them from taking any action under the "Standing Committee" provisions. The relief asked with respect to the second count is a declaratory judgment, declaring that each plaintiff has the right to remain in Sripps' employ for the rest of his or her working life and that such right survives any Preservation Act exemption, an order requiring Scripps to specifically perform the Scanner Agreement according to its terms; alternately, for damages.

The third count is brought as a pendent claim to the claims set forth in the first two counts and is a claim for tortious interference with the plaintiffs' rights under the Scanner Agreement. The claim asserts that the Enquirer at all pertinent times had knowledge of the employment agreement between Scripps and the plaintiffs set forth in the Scanner Agreement; that in September of 1977 when the Joint Operating Agreement was entered into pursuant to which the plaintiffs' employment would be terminated the defendant Enquirer intentionally and maliciously caused Scripps to breach the Scanner Agreement with the plaintiffs, and thus tortiously breach the employment agreement as the result of which Scripps will no longer employ the plaintiffs.

The relief prayed for is an injunction or alternately damages.

Each of the defendants has filed a motion to dismiss. The motion of the defendant Bell goes to Count I and is based on these grounds:

A) That the plaintiffs have failed to allege a case or controversy; that a case or controversy will never arise until the Attorney General actually grants the exemption, if ever; that no case or controversy will ever arise if he denies the exemption; that the question of whether the exemption should be granted is still involved in the administrative procedure; that any review of that procedure is limited to a review under the Administrative Procedures Act.

B) That the plaintiffs lack standing to challenge the Preservation Act and/or the regulations promulgated thereunder.

C) That the Newspaper Preservation Act and the regulations are constitutional and do not deprive plaintiffs of any rights protected by the Fifth Amendment.

Scripps has moved to dismiss each of the three counts. As to Count I, its grounds coincide with the United States. As to Count III, its grounds coincide with those stated in the Enquirer motion, which will be hereinafter summarized. As to Count II, Scripps advances the following bases:

1) That the plaintiffs are not the proper parties to maintain an action under the Scanner Agreement and that the only proper party plaintiff is the Local.

2) The present action is premature since there has been no repudiation of the Scanner Agreement and the procedures established have not been exhausted; that federal labor law mandates that parties to agreements, such as the Scanner Agreement, resolve disputes in accordance with procedures provided in the agreement.

3) That Scripps has a right, subject to the requirement of good faith bargaining, to terminate operation of the Post in whole or in part.

The Enquirer's motion to dismiss with respect to Counts I and II generally tracks the above and, with respect to Count III, claims:

A) That the Court lacks jurisdiction over its subject matter; that the dispute relates to tenure of employment; that the N.L.R.B. arguably has jurisdiction over such a dispute.

B) That the complaint discloses a business reason for the Joint Operating Agreement and contains no allegation of malice.

The differences between the parties have been extensively briefed. In the plaintiffs' brief in opposition, with respect to Count I, the plaintiffs suggest an alternate disposition of the dismissal motions involving that count — that the claims set forth in Count I be stayed pending the Attorney General's determination of whether plaintiffs may be granted intervention as parties to the expected hearing, relying on *United States* v. *Michigan National*, 419 U.S. 1 (1974).

COUNT I
Standing

Section 16 of the Act provides:

> Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the

> antitrust laws . . . when and under the same conditions and principles as against threatened conduct that will cause loss or damage. (15 U.S.C. 26)

For the plaintiffs to successfully maintain Count I, it must appear that the termination of employment affects the area legislatively protected, i.e., that "the interest sought to be protected (in this case, employment) is arguably within the zone of interests to be protected or regulated by the statute" in question. *Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150 (1970), at 153.

We are aware of no reported case (with one possible exception) in which it has been held that a salaried or hourly-waged employee who might lose or has lost his job as a result of anti-competitive merger activity has suffered the "injury to business or property" as required by Section 4, or has standing under Section 16. The authorities are quite to the contrary, at least so far as Section 4 is concerned. Such a loss would, of course, satisfy the "injury in fact" requirement of *Malamud* v. *Sinclair*, 521 F.2d 1142 (6th Cir. 1975).

The questions involved were squarely presented in *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir. 1973); cert. den. 93 S.Ct. 1900 (1973). In that case the plaintiffs, employees of Sinclair, lost their jobs with Sinclair as the result of a merger between Sinclair and Richfield, which the plaintiffs claimed violated the antitrust laws. The Court held:

> For plaintiff to satisfy the business or property prerequisite, he must demonstrate that his job is a commercial venture or enterprise . . .. In no way could his job be construed as a venture or enterprise within the market area endangered by the merger.

After distinguishing cases involving antitrust activities directed against a particular employee or prospective employee (or class thereof) with respect to whom employers have engaged in concerted activities directed against the particular person, class or employment (such as preventing employment and directed to that end) the Court continued:

> Antitrust violations admittedly create foreseeable ripples of injury to individual stockholders, consumers and employees, but the law has not allowed any of these standing to sue.. . .

> . . . Termination of employment will often occur whether a merger is legal or illegal. It is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency . . . the loss of their rights of employment is not a result of any lessening of commercial competition.

Concluding that the loss of employment was not an injury within Section 4, the *Reibert* Court addressed itself to the question whether the interest sought to be protected (employment) was arguably within the zone of interests dealt with by the antitrust laws and reached the negative conclusion. It was pointed out —

> The Sherman Act was enacted to prevent restraint of trade having a significant effect on "business competition". . . . Appellant's termination of employment does not affect the area legislatively protected. At best, appellant's discharge was no more than an outgrowth of the alleged unlawful merger . . .. Appellant is not in the area of economy endangered by a breakdown of competitive conditions, and thus lacks standing to sue.

In *Brunswick v. Pueblo*, 429 U.S. 477 (1977) we find (at 486, et seq.) —

> . . . The Court of Appeals agreed, holding compensable any loss "causally linked" . . .. Because this holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so, we cannot agree with it.
>
> Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holding, once a merger is found to violate § 7, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the reason the merger was condemned. This holding would make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws.
>
> . . . Thus, respondents' injury was not of "the type that the statute was intended to forestall."

In a footnote, No. 13 at 488, *Reibert* was then cited as an "instance(s) in which plaintiff(s) unsuccessfully sought damages for injuries unrelated to the reason the merger was prohibited."

Brunswick has been applied by the Ninth Circuit in *Lenore* v. *Olympia*, 550 F.2d 495 (1977). In *Lenore* a former beer distributor sued under the Clayton Act after the acquisition of one brewer by another and the subsequent termination by the acquiring brewery of the acquired brewery's wholesale distributors, including the plaintiff. The District Court granted summary judgment to the defendant, holding that the plaintiff lacked standing. The Court said:

> Lenore is not within that class of persons whom Congress intended to protect by § 7. If we were to assume that Olympia's acquisition of Hamm did present a § 7 violation, it would only do so because of a probable lessening of competition in the production of beer. A competing manufacturer might have the right to bring a private action against Olympia . . . while Lenore has proved an injury, he has not shown that he has suffered an antitrust injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. (Citing *Brunswick*.)

We are aware that Count I rests on Section 16 and not Section 4 and that the "by reason of" requirements of the latter are more stringent than the "by" requirement of the former. *Hawaii* v. *Standard Oil*, 405 U.S. 251 (1971). To have "standing" under either section, a plaintiff must be engaged in activities intended to be protected by the antitrust laws. *Reibert* involved both Section 4 and Section 16; *Brunswick* and *Lenore* involved only Section 4.

There is no doubt that the plaintiffs will suffer harm or injury in fact if the Joint Agreement be carried out. However, economic harm sustained by those, such as plaintiffs, outside the target area is not antitrust injury and, for that reason, the plaintiff lack standing. The motion to dismiss as to Count I is well taken and should be sustained.

It would serve no useful purpose to "stay proceedings" on Count I in view of that conclusion. If the plaintiffs desire to further amend Count I, they may do so within 30 days. Lacking such amendment, that count should be dismissed and final judgment entered thereon and such is directed (in the absence of any amendment), there being no just reason for delay.

COUNT II
A — Standing

Defendant Scripps contends that the plaintiffs have no standing because —

1) The question involved affects the bargaining unit as a whole. The plaintiffs include all of the members of the unit.

2) The Scanner Agreement limits standing to the Post and the Union, since it may be cancelled or modified only by mutual agreement of the Post and the Union.

3) An employee may seek relief in a 301 case in order to vindicate his individual rights only if he establishes that his Union did not perform toward him the duty of fair representation.

We hesitate, in deciding a motion to dismiss, to (and do not) classify the Scanner Agreement as an "employment agreement." At the same time there is no hesitancy in describing it as a collective bargaining agreement, which is decidedly different from those involved in the case authority upon which defendant rests its motion. The term "working life," the phrase "continuous employment of such an employee as a printer," coupled with the identification of a person by name in the contract implies a *personal* as distinguished from a "unit" right.

The requirement of "failure to fairly represent" an employee resorting to the courts applies only to contexts in which the collective bargaining agreement involved contains provisions purporting to restrict access to the courts by providing other and exclusive methods of determination. See *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967). This Court cannot conclude as a matter of law that the agreement involved here does that. It does not *require* a determination, nor does it ascribe the effect either of any such or lack thereof. Certainly the parties did not intend that a standoff resulting from fair representation meant that no employee had any remedy for any Scripps violation (except to strike or lock-out).

Our conclusion is simply that an employee specifically named in a collective bargaining agreement and extended personal employment provisions thereunder has standing to bring a 301 case for a claimed

violation in the absence of some contractual provision providing for another method of determining the controversy and defining the effect of such determinaion.

B — Failure to Exhaust (Bypass)

Defendants assert:

a) Federal labor policy requires that plaintiffs exhaust contractual remedies contained in the Scanner Agreement prior to commencing this action, and

b) 29 U.S.C. 173(d) mandates "final adjustment by a method agreed upon by the parties . . ."

The "Standing Committee" provisions of the Scanner Agreement provided for a body empowered to "discuss" and "interpret." In *Vaca*, the Supreme Court, in a footnote referring to the type of contract which provided for a grievance and arbitration procedure, said:

> If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted.

The key question in the exhaustion problem, from whatever aspect it may be viewed, is: What was the intention of the parties? "Intention" is a question of fact — and the question is presented here on a motion to dismiss. Defendants assert, in effect, that the "intention" may be finally determined — and should be — within the provisions of the Scanner Agreement itself.

There is a presumption of exclusivity — rebuttable only by an express contract provision to the contrary — if the contract involved provides for a grievance procedure "capped" with "binding arbitration." *Republic Steel* v. *Maddox*, 379 U.S. 650 (1964). Such is not the case here.

The plaintiffs point out (in concluding that the question of intention may not be determined on a motion to dismiss on this record) that:

a) The parties to the Scanner Agreement were well aware of the methods of providing for exclusivity — witness the general

collective bargaining agreement, but stopped far from doing so either in the Scanner Agreement as originally drawn or in the extention (implying an intent to the contrary).

b) There is no mechanism provided for the resolution of a deadlock.

The many cases cited by the defendants have been carefully examined. None of them is authority for the proposition that the intention of the parties to a collective bargaining agreement with respect to the question of exclusivity is determinable as a matter of law based on the agreement itself, excepting (a) where the agreement in fact provides for final arbitration, or (b) where a joint committee has in fact arrived at a final determination equivalent to an arbitration award.

On a motion to dismiss, doubts must be resolved in plaintiffs' favor and inferences drawn in the same way. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The question of the "intent" is one of fact, and this Court cannot say that it could not reasonably be inferred that exclusivity was not intended. It is not the province of the Court to infer one way or another on this motion, but simply to recognize what inferences could, with reason, be drawn.

The motion to dismiss Count II is denied.

COUNT III
A — Preemption

29 U.S.C. 157 provides in part:

> Employees shall have the right . . . to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining . . . (Sec. 7 of the Act)

29 U.S.C. 158(a), (Sec. 8 of the Act) states:

> It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7 . . .

It is, of course, conceded that if conduct by either a union or employer (whether or no [sic] such is the employer of the employees involved) is arguably a violation of 29 U.S.C. 158(a). N.L.R.B.

jurisdiction, whether or not exercised, is exclusive and Court jurisdiction is preempted. (We are not here concerned with 301, since the Enquirer is not a party to the agreement involved.)

The Enquirer motion to dismiss Count III in the preemption aspect is summed up this way — "if, as alleged, Scripps repudiated the Scanner Agreement, such action would be arguably an unfair labor practice . . . If, as alleged, the Enquirer . . . induced Scripps to engage in such repudiation and thus tortiously interfered with the plaintiffs' contractual employment relationship, such conduct by the Enquirer might arguably constitute a violation of Section 8(a). That section makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7 . . . One of the rights guaranteed to employees by Section 7 is the right to bargain collectively. That right is impaired when an employer party repudiates the collectively bargained agreement. Thus, the employees' rights to bargain is interfered with when a third party employer induces such repudiation."

The key question is whether the "repudiation" as described in the complaint can arguably be described as interference with bargaining rights. The cases in which "repudiation" has been held as "arguable" interference —

N.L.R.B. v. *M & M*, 377 F.2d 712 (2nd. 1967);

Naccarato, etc., 233 N.L.R.B. No. 196 (1977);

Schieber Millinery, 26 N.L.R.B. No. 99 (1940);

arose on factual situations which provided some nexus between the collective bargaining of the agreement involved and the repudiation (for example, a short interval between contract and repudiation would furnish the basis for questioning the good faith of the bargaining).

In this case, the alleged repudiation took place some three and a half years after the employee activity. By no stretch of imagination could the alleged "repudiation" in 1977 be described as any indication that the Post had not bargained in good faith in 1974 or that repudiation was "contemplated" during the 1974 negotiations, or that it interfered with any collective bargaining.

B — Malice

Count III of the complaint as originally filed charged the Enquirer with intentionally causing Scripps to breach the Scanner Agreement and tortiously interfering with the plaintiffs' contractual employment relationship. The Enquirer motion to dismiss as to it was based on —

> Under Ohio law, there is no right of action against a person who has induced a breach of contract unless that person acted "otherwise than in the legitimate exercise of his own rights, and without justification." A critical element in an action for tortious interference is a showing of malice on the part of the alleged interferor.

In the amended complaint, Count III has been amended to charge that Scripps "intentionally and maliciously" caused, etc.

The Enquirer has requested "the Court to consider its motion to dismiss as directed to the amended complaint . . ."

The matter boils down, therefore, to whether, on a motion to dismiss, a court may determine that the additional fact allegation of "malice" is frivolous. This Court concludes to the contrary, in this context, based on (1) the "benefit to himself" inclusion in *Pestel* v. *Model*, 39 O.L.A. 197 (C.A. Franklin, 1943), and (2) the "intentional doing" definition in *Reichman* v. *Drake*, 89 Ohio App. 222 (Hamilton, 1951).

The motion to dismiss Count III is denied.

/s/ _____

United States District Judge

APPENDIX F

United States Code, Title 15

§ 1801. Congressional declaration of policy

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

Publ.L. 91-353, § 2, July 24, 1970, 84 Stat. 466.

§ 1802. Definitions

As used in this chapter —

(1) The term "antitrust law" means the Federal Trade Commission Act and each statute defined by section 44 of this title as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two of more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(3) The term "newspaper owner" mean any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

(4) The term "newspaper publication" means publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the

same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

Pub.L. 91-353, § 3, July 24, 1970, 84 Stat. 466.

§ 1803. Antitrust exemption

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint news-

paper operating arrangement or any party thereto shall be exempt from any antitrust law.

Pub.L. 91-353, § 4, July 24, 1970, 84 Stat. 467.

§ 1804. Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 1803(a) of this title.

(b) The provisions of section 1803 of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States [1] on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

Pub.L. 91-353, § 5, July 24, 1970, 84 Stat. 467.

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[1] Word "States" reads "State" in original.

APPENDIX G

United States Code, Title 29

§ 158. Unfair labor practices

* * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing

contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

* * *

AMENDMENTS

1974—Subsec. (d). Pub. L. 93-360, § 1(c), (d), substituted "any notice" for "the sixty-day" and inserted, "or who engages in any strike within the appropriate period specified in subsection (g) of this section," in the loss-of-employee-status provision and added the enumeration of modifications to this subsection which are to be applied whenever the collective bargaining involves employees of a health care institution.

* * *

APPENDIX H

United States Code, Title 29

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regarding to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organizations which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organiza-

tion, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, ch. 120, title III, § 301, 61 Stat. 156.)

Opposition

Office - Supreme Court, U.S.
FILED
APR 29 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1827

THE E. W. SCRIPPS COMPANY

Petitioner,

v.

BERNARD J. HEHEMAN, et al.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does any provision of federal labor law prevent a court from applying traditional principles of contract law in calculating the damages recoverable by employees fired in breach of an express employment contract?

2. Does the Newspaper Preservation Act authorize a communications conglomerate to escape its contractual commitment to printers employed to work in the composing room of one of its newspapers where it has obtained an exemption from the antitrust laws to permit that newspaper to be produced by the employees of another newspaper under a joint operating agreement?

3. Where it is clear from the plain words of an employment contract that the parties intended the promise contained therein to survive the closing of the production facilities of a newspaper, does any principle of federal law preclude the enforcement of that promise?

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IN THE

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---

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Bernard J. Heheman, et al., respectfully request that this Court deny the petition for Writ of Certiorari, seeking review of the Sixth Circuit's opinion in this case, reported at 661 F.2d 1115.

STATEMENT OF THE CASE

This is a simple breach of contract case in which the Respondents seek damages against their former employer for breach of a third party beneficiary employment contract wherein the Petitioner promised that all of the named beneficiaries "will be continuously employed for the remainder of their working lives . . . ." The Petitioner repudiated and subsequently breached that contract when it fired all of the Respondents. The Court of Appeals ruled that the contract is enforceable according to its plain terms. The Petitioner seeks through sophistry, to entice this Court to grant Certiorari and ultimately relieve the Petitioner from the consequences of its breach of contract. As the Respondents demonstrate herein, this case presents no issue of unsettled federal policy, and thus it does not warrant a merit inquiry by this Court.

As stated by the Sixth Circuit:

> By the late 1960's, new computer technology was beginning to work dramatic changes in traditional relationships between publishers and printers in the newspaper industry. Computers that could "scan" typewritten scripts and directly typeset their words without retyping by printers made it possible for highly skilled linotype operators to be replaced by less skilled employees and computerized equipment.
>
> Like other newspapers across the country, the Cincinnati Post and the Cincinnati Enquirer were affected. A letter of understanding signed with a 1973 collective bargaining agreement between the Cincinnati Daily Newspaper Publishers Association, the negotiating agent of the Post and the Enquirer, and the Cincinnati Typographical Union Number Three, which included the printers for both papers, made explicit reference to changes that might be precipitated by the new technology. The letter noted that the

parties agreed to defer discussions of the printers' job security until the effects of equipment the newspapers might introduce could be foreseen more precisely. Those discussions led to the execution of what the parties called the "Scanner Agreement" on June 10, 1974. Signed by representatives of the Post and the typographical union, it is quite short. It details new equipment the newspaper would install and describes its effects on full-time employees — called "situation holders." And it appears, through language that lies at the center of the parties' dispute, to guarantee named situation holders lifetime employment in exchange for their acceptance of the new equipment:

> Job Security
>
> The Post and Times-Star agrees that all regular situation holders and apprentices who will become regular situation holders, as listed in the Post's priority list dated May 1, 1974, *will be continuously employed for the remainder of their working lives by The Post as printers,* subject to voluntary terminations, voluntary retirements, disability retirements: as prescribed and defined in F.I.C.A. (Social Security Act) and involuntary terminations for just cause, as provided in Section 21 of the Contract. In case a strike, lockout or "act of God" results in a period of temporary suspension of the employer's composing room operation, the job security will be suspended for such period of temporary suspension of operation only. *This Job Security Agreement* shall supersede any and all existing contracts and/or agreements between The Post and Times-Star and the Union for said named employees, and *is permanent* unless cancelled by mutual agreement of both The Post and the Union.
>
> During such continuous employment of such an employee by The Post as a printer, he or she will be paid the then applicable wage scale for

> printers (and covered by any other terms and conditions of employment) which are negotiated and set forth in the existing and any and all succeeding collective bargaining agreements between The Post and the Union. *The Post and Times-Star,* in addition to its commitment to provide the aforementioned job security to certain named printer employees, *has assured the Union that in the future it will continue to make composing room job opportunities available* to such employees so that they can continue to perform meaningful and gainful work for The Post. (Emphasis added.)

. . . In 1976 a renewal collective bargaining agreement was signed, to be effective until March 1, 1981. It provides that in pertinent part the 1974 Scanner Agreement was to remain in effect. . . .

Faced with continuing financial difficulties despite the industry's technological advances, the Post entered into negotiations with the Enquirer with the aim of reducing costs by combining some operations. In September 1977 the newspapers executed a joint operating agreement that provided, *inter alia,* for the Post to be composed and printed by the Enquirer. On grounds that the Post qualified as a "failing newspaper" under the provisions of the Newspaper Preservation Act, 15 U.S.C. § 1801 (1976), the Post applied to the Attorney General of the United States for an exemption to antitrust laws that would otherwise prohibit the arrangement between competitors. The joint operating agreement was to take effect after written consent was granted by the Attorney General. Hearings on the application were held before an administrative law judge. . . . He concluded that the Post was "in probable danger of financial failure," the standard imposed by 15 U.S.C. § 1802 (5), and that approval of the joint operating agreement would effectuate the purposes of the Newspaper Preservation

Act. The administrative law judge's conclusions were adopted by the Attorney General in November 1979, and the Cincinnati newspapers were thereby granted an exemption from the antitrust laws.

The next month the Post's composing room was closed, and all the printers were fired.

In December 1977, having received word that they would lose their jobs, more than one hundred situation holders and substitute printers filed this suit in the Southern District of Ohio against the publisher of the Post, E. W. Scripps Co., and the Cincinnati Enquirer, Inc. Jurisdiction was based on § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. They claimed breach of their collective bargaining agreement, and they claimed that the Enquirer, by taking over the Post's printing operations, had tortiously interfered with the lifetime employment provisions of the Scanner Agreement. Their claims for damages for those actions are before this court. Plaintiffs also set out due process and antitrust claims, and Scripps counterclaimed for tortious interference with *its* negotiating rights. Those claims were dismissed. and their dismissal has not been appealed.

In July 1978 the District Court granted summary judgment against the substitute printers. In August 1979 it granted summary judgment against the situation holders on their tortious interference claim against the Enquirer. In November 1979, on cross-motions for summary judgment, the court held that the situation holders were entitled to damages for breach of the Scanner Agreement but that because the Scanner Agreement was dependent on the 1976 collective bargaining agreement, the Scanner Agreement expired when the underlying agreement expired in 1981. The court held that the situation holders had no obligation to mitigate damages for the period running from the time they were discharged until the 1981 expiration.

Heheman v. *E. W. Scripps Co.*, 661 F.2d 1115, 1118-20 (6th Cir. 1981). (Emphasis supplied by the Court.)

Each of the District Court's rulings described above was appealed. The Sixth Circuit affirmed the grant of summary judgment in favor of the Enquirer but reversed the balance of the District Court's rulings. The Court of Appeals' seminal determination is that the promise of lifetime employment which Scripps made to the Respondents is enforceable as a matter of the common law of contracts. The Court of Appeals also held that this is a case in which ordinary concepts of damage mitigation are applicable, and it remanded the case to the District Court for the calculation of the damages due each of the printers.

In contrast to the Petitioner's characterization of the employment contract as ancillary to the standard collective bargaining agreement fixing wages, fringes and working conditions, the Court of Appeals saw the Scanner Agreement as embodying the crucial terms of the employment relationship. The Court of Appeals did not regard its determination that the employment contract is enforceable according to its clear terms as foreshadowing any threat to federal labor policy. Neither did it evince any concern that the enforcement of the Scanner Agreement would vitiate the purposes of the Newspaper Preservation Act.

Scripps' Petition for Certiorari is calculated to create the illusion of disquieting federal issues requiring this Court's attention. In the following discussion, the Respondents demonstrate that not one of Scripps' illusions is a genuine issue.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Court Of Appeals Did Not Direct The District Court To Establish The Terms Of A Collective Bargaining Agreement, And Consequently The Court Of Appeals' Decision Is In Harmony With All Applicable Federal Labor Law.

In an effort to create an issue of sufficient magnitude to attract this Court's attention, the Petitioner has attempted to engraft a question of federal labor law onto a simple common law contract case. Toward this end, the Petitioner mischaracterizes the Court of Appeals' opinion as one which directs the District Court "to write a series of collective bargaining agreements for *The Post* and CTU No. 3" in order to "fill in missing contract terms. . . ." Petition, pp. 9-10. The Court of Appeals' opinion refers to "missing contract terms" only in regard to the traditional judicial function of assessing an adequate amount of damages which would compensate the Respondents for their losses:

> We do not believe the District Court on remand will have serious difficulty in this case, after giving the parties an opportunity to be heard on the issue, in filling in missing contract terms and in fashioning a remedy for breach *in accordance with general principles of damages* under Ohio Law.

Petition, App. B at 14a-15a. (Emphasis supplied.) Quite clearly, the Court of Appeals has not itself or through its mandate to the District Court "impose[d] upon management or a union the substantive terms of an agreement." Petition, p. 9. All that the Court of Appeals has done is to remand the case to the District Court for a calculation

of damages consistent with the Sixth Circuit's interpretation of the duration of the guarantee of employment of the Scanner Agreement.

In reaching its determination as to the applicable measure of damages for the Petitioner's breach, the Court of Appeals undertook a two-step analytical process, the results of which present no issue appropriate for the grant of certiorari by this Court. It first focused upon the clear, unambiguous language of the contract as expressing the intent of the parties[1] to provide a guarantee of lifetime employment to the Respondents. That determination involves no question of labor law.[2]

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[1] In determining the intent of the parties, the Court of Appeals properly considered only the language of the Scanner Agreement itself in concluding that the parties intended to provide guaranteed employment beyond the duration of any particular collective bargaining agreement. "This Scanner Agreement, however, is simply too precise and too unambiguous to permit any other inference about the intent of the contracting parties." Petition, App. B at 12a. Where the language of a contract is plain and unambiguous it is not in need of interpretation and the court must, as a matter of law, give the language of the contract its ordinary meaning. *See, e.g., Scott* v. *Anchor Motor Freight, Inc.*, 496 F.2d 276, 280 n.2 (6th Cir. 1974); *General Tire & Rubber Co.*, v. *Firestone Tire & Rubber Co.*, 489 F.2d 1105, 1123-24 (6th Cir. 1973); *Local 783, Allied Industrial Workers* v. *General Electric Co.*, 471 F.2d 751, 756-58 (6th Cir.), *cert. denied*, 414 U.S. 822 (1973).

[2] It is universally recognized that the specific law governing the formation and existence of a collectively bargained employment agreement is ordinarily determined by the general contract principles of offer and acceptance as reflecting the intent of the parties. *United Steelworkers* v. *Bell Foundry Co.*, 626 F.2d 139, 140 (9th Cir. 1980); *Teamsters, Local 524* v. *D. S. Billington*, 402 F.2d 510, 513 n.2 (9th Cir. 1968); *F. W. Means & Co.* v. *NLRB*, 377 F.2d 683, 686 (7th Cir. 1967); *Lozano Enterprises* v. *NLRB*, 327 F.2d 814, 819 (9th Cir. 1964); *Daniel Construction Co.* v. *Teamsters Local 991*, 364 F. Supp. 731, 736 (S.D. Ala. 1973); *United Steelworkers* v. *Rome Industries,*

As a second step in its analysis, the Court of Appeals considered the issue of effectuating this intent in an action seeking damages for breach of contract. In this latter consideration, the Court of Appeals relied heavily upon the conclusion that Scripps had breached the Scanner Agreement and thereby "made unavailable the process by which the contract terms were to be supplied." Petition, App. B at 14a. Again, the Court of Appeals quite correctly found that neither contract principles nor federal labor law preclude the implementation of the parties' intent.[3] Interestingly, the Petitioner cites no cases which in any way call into question the Court of Appeals' reasoning or conclusions as to either of these two phases of its analysis.

Inc., 321 F. Supp. 1170, 1174 (N.D. Ga. 1970); *United Steelworkers* v. *O'Neal Steel, Inc.*, 321 F. Supp. 235, 238 (N.D. Ala. 1969). *See Kentucky Skilled Craft Guild* v. *General Electric Co.*, 431 F.2d 62 (6th Cir. 1970).

[3] The Court of Appeals found that an enforceable agreement for lifetime employment was entered eight years ago for the benefit of the Respondents. The applicable wage scale was incorporated from the collective bargaining agreements entered by *The Post* and CTU No. 3. The Petitioner unilaterally terminated its employment relationship with the Respondents in violation of the Scanner Agreement. As a consequence, the means whereby future compensation was to be determined was obliterated. The Petitioner may not now argue that the alleged indefiniteness resulting from its breach rendered the substantive terms of the Scanner Agreement unenforceable. Such an interpretation renders the lifetime employment promise illusory, subject to a condition (continuation of the collective bargaining relationship) exclusively within the Petitioner's control. The well settled rule that contract language will not be interpreted so as to render a contractual promise illusory applies with equal force to labor agreements. *Retail Clerks International Association Local 455* v. *NLRB*, 510 F.2d 802, 806 n.15 (D.C. Cir. 1975); *Trustees of the Atlanta Iron Workers Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1105 n.11 (N.D. Ga. 1981). The Petitioner may not thus profit by its own bad faith. This analysis is fully supported by 1 *Corbin on Contracts* § 98.

Rather, in a transparent effort to create an issue of federal labor law where none exists, the Petitioner focuses on the Court of Appeals' instructions on remand regarding the calculation of damages.

Not surprisingly, the Petitioner's argument as to the calculation of damages deemphasizes one essential and inescapable determination reached by both the District Court and the Court of Appeals: the Petitioner is in breach of the promise of lifetime employment. The Petitioner would have this Court disregard that breach and misperceive the Court of Appeals' mandate as a direction to the District Court to force the parties to convene a bargaining session or, in the alternative, to impose a judicially-formulated contract upon the parties.[4] The Court of Appeals clearly did

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[4] The cases upon which the Petitioner relies involve the scope of the remedial powers of the National Labor Relations Board after a finding of a failure to bargain in good faith in contravention of the NLRA. This case does not involve an unfair labor practice charge resulting from a failure to bargain in good faith, but rather is predicated upon the breach of an employment contract voluntarily entered by *Scripps* and the Respondents. *See, e.g., NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 281-91 (1972) (the Board may not order a successor employer to observe the terms of an agreement not voluntarily assumed which was negotiated by the union and the previous employer); *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970) (although the Board has the power to require employers and employees to negotiate, its remedial powers do not extend to the imposition of substantive contractual terms on either party); *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960) (the Board's authority under Section 8(b)(3) of the NLRA, 29 U.S.C. § 158(b)(3), does not extend to prohibiting a union from the utilization of certain types of economic pressure during the course of the bargaining process); *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952) ("the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements"); *NLRB* v. *Sumner Home for the Aged*, 599 F.2d 762, 766 (6th Cir. 1979) ("the Board cannot compel either party to propose or accept substantive terms of the contract").

not do this. No case cited by the Petitioner deals with the pertinent issue of whether a court may look to the projected probable result of collective bargaining as a means of calculating damages.[5] Unlike the situations in the cases upon which the Petitioner relies, the Respondents have not sought the imposition of substantive terms in an ongoing collective bargaining relationship. Their collective bargaining relationship with Scripps was destroyed when Scripps fired them in breach of the Scanner Agreement.

The substantive terms of the Scanner Agreement were agreed upon nearly eight years ago and need no expansion. The Court of Appeals merely directed the District Court to devise the means of calculating the damages accruing to each printer as a result of Scripps' breach of the guarantee of lifetime employment embodied in that Agreement. The Respondents do not challenge the Petitioner's contention that Section 8 (d) of the NLRA, 29 U.S.C. § 158 (d), prohibits a court from compelling an agreement between parties to a collective bargaining relationship. Rather, they assert that this principle, and the cases cited by the Petitioner, are totally inapposite to the issue of whether the intent of the parties can be honored in an action for breach of a lifetime employment guarantee. This issue, which functionally translates into a determination of damages,

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[5] "If the parties have concluded a transaction in which it appears that they intend to make a contract, the Court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires . . . the filling of some gaps the parties have left. The fact that the parties have left some matters to be determined in the future should not prevent enforcement, if some method of determination independent of a party's mere 'wish, will and desire' exists, either by virture of the agreement itself or by commercial practice or other usage or custom." 1 *Corbin on Contracts* § 95 at 400-02. *See Litsinger Sign Co.* v. *The American Sign Co.*, 11 Ohio St.2d 1, 14 (1967).

presents no significant question of national concern which warrants consideration by this Court.[6]

B. The Court Of Appeals' Decision Does Not Undermine Any Policy Or Objective Of The Newspaper Preservation Act.

The Petitioner's second contention, which it raised for the first time in its Petition for Rehearing filed in the Sixth Circuit,[7] is that the Court of Appeals' decision undermines the policies and objectives of the Newspaper Preservation Act (NPA), 15 U.S.C. §§ 1801 *et seq.* Stripped to its essence, it is the Petitioner's contention that the provisions or policies of the NPA authorize Scripps to dishonor its unequivocal contractual obligations to the Respondent-printers simply because it has entered into a joint operating agreement. The authority cited by the Petitioner fails to support this contention. Consequently, no issue appro-

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[6] If the Petitioner's authority has any relevance to this determination, it lies in a recognition that the duty to bargain in good faith makes it clear that for as long as an employer/employee relationship existed between Scripps and the printers, a collective bargaining agreement providing for the payment of the prevailing wage would have been in effect. This makes it relatively easy to calculate damages.

[7] The Petitioner did not advance this argument before either the District Court or in its brief or argument before the Sixth Circuit. Accordingly, the Court should decline to grant Certiorari to decide it. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 194 n.13 (1976); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Lawn* v. *United States*, 355 U.S. 339, 362-63 n.16 (1958); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957). *See also* 13 *Moore's Federal Practice* ¶ 817.41, p. SC17-42 (2d Ed. 1981) ("As a rule, the Court will not grant certiorari to decide an issue that was not raised in the proceedings below – irrespective of its general significance or novelty."); *and, generally*, R. Stern & E. Gressman, *Supreme Court Practice* § 6.27, pp. 458-61 (5th Ed. 1978).

priate for a grant of certiorari is presented by this case. Sup. Ct. R. 19.

Although it is a general policy of the NPA to preserve competitive newspapers, *see* 15 U.S.C. § 1801, Congress did no more to effect this policy than to grant limited exemptions from the antitrust laws to newspapers operating under joint agreements which, absent such exemptions, might be subject to antitrust liability.[8] The NPA has only one operative section, *i.e.*, § 1803, "Antitrust Exemption." *See Comment: The Newspaper Preservation Act,* 32 Univ. of Pittsburgh L. Rev. 347, 350-51, 353 (1971). There is nothing in the NPA or its legislative history to suggest that Congress intended the act to intrude into the area of contract law. More specifically, no provision or policy

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[8] The NPA was designed to accomplish the following objectives:

1. To declare a public policy applicable to certain joint newspaper operating arrangements in the interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States.

2. To grant a limited exemption from the antitrust laws for joint newspaper operating arrangements that have been entered into prior to the effective date of this Act in twenty-two cities, communities, or metropolitan areas of the United States.

3. To provide a limited exemption from the antitrust laws for joint newspaper operating arrangements entered into in the future with the prior written consent of the Attorney General of the United States after the Attorney General has made certain determination defined in the Act.

4. To permit the joint newspaper operating arrangement in Tucson, Arizona, to be reinstated notwithstanding the opinion of the Supreme Court in *Citizen Publishing Company* v. *United States,* 394 U.S. 131 (1969).

5. To declare that the limited antitrust exemption provided in the Act shall apply to the determination of any civil or criminal antitrust action pending in any district court of the United States.

1970 U.S. Code Cong. & Admin. News 3547.

of the NPA authorizes newspapers entering into joint operating agreements to cancel, rescind or otherwise dishonor their executory contracts because the NPA simply has *no* function other than that of exempting certain joint operating arrangements of newspapers from the antitrust laws. *Id.* at 353; *see also America's Best Cinema Corp.* v. *Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328, 334 (N.D. Ind. 1972); *Note, The Newspaper Preservation Act: A Critique*, 46 Ind. L.J. 392 (1971); *The Newspaper Preservation Act: An Ineffective Step in the Right Direction*, 12 Boston Coll., Ind. & Comm. L. Rev. 937 (1971).

The Petitioner's "accommodation" argument – that this is a case in which federal labor policy must give way to a paramount policy of the NPA – misses the mark completely. The cases the Petitioner cites to support that argument involve direct tension between federal labor policy and *an express* provision of some bankruptcy[9] or admiralty[10] statute which the court deemed controlling.

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[9] For example, in the bankruptcy cases cited by the Petitioner, *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210 (9th Cir. 1980); *Shopmen's Local No. 455* v. *Kevin Steel Products, Inc.*, 519 F. 2d 698 (2d Cir. 1975); and *Brotherhood of Railway Clerks* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975), the courts held that collective bargaining agreements are not exempt from § 313(1) of the Bankruptcy Act, 11 U.S.C. § 365(a), which expressly permits the Bankruptcy Court to reject executory contracts of the debtor. The Courts reasoned that the unique features of labor agreements do not overcome the plain language of the Bankruptcy Act. More importantly the Courts perceived no direct conflict between § 301 of the NLRA and § 313(1) of the Bankruptcy Act. The Courts recognized that a debtor in possession or trustee is a new legal entity, subject to the supervision of the Bankruptcy Court, with its own rights and duties. Therefore, it is analogous to a successor employer who is generally not bound by the terms of the existing labor agreement. *NLRB* v. *Burns Security Services*, 406 U.S. 272 (1972).

[10] Similarly, in the admiralty cases cited by the Petitioner, the courts interpreted the provisions of federal labor law so as to accommodate im-

Enforcement of the Scanner Agreement creates no conflict with any express provision of the Newspaper Preservation Act or any other federal law and thus the authority Petitioner cites does not advance its cause.

Scripps tries to convince this Court that implementation of the Court of Appeals' decision would place an unbearable financial burden upon the shoulders of a "financially failing newspaper," or, indeed, one that has already "failed". *See* Petition, pp. 4, 10-11, 12. In a patent play for sympathy, the Petitioner sets forth various findings made by Administrative Law Judge Moore to the effect that *The Post* was a failing newspaper or, perhaps, that it had already failed. Petition, p. 4. The Petitioner hints melodramatically that if the Court of Appeals' decision is upheld, the burden of damages will bring *The Post* to its

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portant policies of federal maritime law, again, only because those provisions conflicted with express provisions of federal admiralty law which the courts deemed to be paramount. *See, e.g., U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351 (1971) (a grievance and arbitration provision in a collective bargaining agreement, enforceable under § 301 of the National Labor Relations Act, does not abrogate the specific statutory remedy which permits seamen to sue for wages in federal court, 46 U.S.C. § 596); *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31 (1942) (the provisions of the National Labor Relations Act permitting employees generally to strike in order to protest unfair labor practices of their employers does not apply to seamen aboard ships upon the navigable waters of the United States where such refusals to obey the lawful command of their Captain would constitute mutiny or conspiracy to commit mutiny under the express provisions of 46 U.S.C. §§ 292, 293); *Mt. Vernon Tanker Co.* v. *NLRB*, 549 F.2d 571 (9th Cir. 1977) (section 7 of the National Labor Relations Act, 29 U.S.C. § 157, which permits employees to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection," does not confer upon seamen the right to refuse to submit to a disciplinary procedure specifically mandated by 46 U.S.C. §§ 701, 702 without union representation).

financial knees. This is obfuscation, and an abuse of the record in this case.

It should be understood that the Cincinnati Post is merely an operating division of the E. W. Scripps Company. The E. W. Scripps Company, a communications empire which owns and operates seventeen daily newspapers, seventeen weekly newspapers and nine television stations, is the contracting party to the Scanner Agreement, and it will bear the ultimate burden of paying damages to the Respondents. Whether *The Post* is now financially troubled is both outside of the record and irrelevant. The record discloses that it is still very much in business and, presumptively, it is making a profit. Be that as it may, Scripps must live with the consequences of its decision to breach the promise of lifetime employment it made to more than one hundred workingmen.

C. The Court Of Appeals' Determination That The Scanner Agreement Survives The Implementation Of The Joint Operating Agreement Presents No Conflict With Federal Labor Law.

The Petitioner argues that the Court of Appeals' decision contravenes established principles of federal labor law which are said to confer upon *The Post* the right to close any or all of its operations. The Petitioner has again contorted the holdings of the Court of Appeals and, moreover, has misstated the applicability of authority in an effort to create an issue of federal labor law where none exists.

The only issue in this case is one of intent: whether the parties to the Scanner Agreement intended a guarantee of lifetime employment which would survive the closing of *The Post's* production operations. As to this issue, the

Court of Appeals found that the parties intended a contract which guaranteed lifetime employment to more than one hundred individually named situation holders. The Court of Appeals focused on the express terms of the Scanner Agreement and held that no other intent could be reconciled with the plain language of the contract:

> The Supreme Court has recognized the distinction between, on the one hand, collective bargaining agreements that set conditions of employment but guarantee no individual a job, and on the other, contracts of employment that do guarantee jobs. *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 334-35 (1944). The Supreme Court noted that "in rare cases" collective bargaining agreements are contracts of employment, and the explicit language of the Scanner Agreement makes clear that it is, as the District Court concluded, among such cases.

Petition, App. B at 15a.

All of the Petitioner's authority is patently inapposite to the issue of the recovery of damages for breach of an express guarantee of lifetime employment.[11] Unlike the authority upon which the Petitioner relies, this case is not an action for remediation of an unfair labor practice.[12]

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[11] The Petitioner's argument misrepresents the applicable law by implying that an employer's right to close its facilities is absolute. Even cases cited by the Petitioner do not stand for such a proposition. *See, e.g., Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965).

[12] In *Textile Workers Union* v. *Darlington Manufacturing Co., supra,* the union filed an unfair labor practice charge against an employer which shut down its operations shortly after the union won its representation election. The NLRB determined that the plant closing constituted an unfair labor practice in violation of Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3). On appeal, the Fourth Circuit reversed,

Neither is it an action for breach of a standard collective bargaining contract.[13] Consistent with this Court's holding in *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), the contract which was breached was a contract of employment

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holding that an employer has an absolute right to close all or part of its business. This Court remanded for further findings by the NLRB to determine the purpose of the closing. In so remanding, this Court distinguished between an employer's right to shut down its *entire* operation and a partial closing which may constitute an unfair labor practice if the purpose is to chill unionism. Unlike *Textile Workers*, the case before this Court does not involve the charge of an unfair labor practice by the union seeking backpay for its members. Rather, this case is an action for breach of an employment contract whereby the Respondents are seeking damages for breach of a lifetime employment guarantee.

[13] *See, e.g., Fraser* v. *Magic Chef-Food Giant Markets, Inc.*, 324 F.2d 853 (6th Cir. 1963) (where an employer shuts down its operations before the termination of a collective bargaining agreement governing the terms and conditions of employment, an employee may not recover the wages he would have received had the employer continued its operations throughout the duration of the agreement); *Union de Trabajadores de la Industria Gastronomica* v. *Helio San Jeronimo Corp.*, 434 F. Supp. 643 (D. Puerto Rico 1977) (where a collective bargaining agreement governing the terms and conditions of the employment relationship contains a provision for an annual guarantee of hours, the employer may discontinue its business before the specific termination date of the collective bargaining agreement absent a limiting provision in the contract); *Bakery and Confectionary Workers International Union Local 12B* v. *The Great Atlantic and Pacific Tea Company, Inc.*, 357 F. Supp. 1322 (W.D. Pa. 1973), *aff'd mem.*, 491 F.2d 748 (3d Cir. 1974) (where a collective bargaining agreement contains a provision guaranteeing forty (40) hours work per week but there is no guarantee of continuous employment, the employer has the right to terminate its operations and after the discontinuation of business an employee cannot recover what he would have earned during the remainder of the term of the collective bargaining agreement); *American Bakery and Confectionery Workers International Local 12* v. *Liberty Baking Co.*, 242 F. Supp. 238 (W.D. Pa. 1965) (the expiration clause of a collective bargaining agreement does not limit an employer's right to completely discontinue its operations).

containing explicit, bargained for guarantees of lifetime employment. Thus, the cases which the Petitioner cites do not in any way limit the right of recovery for the contract damages to which the Respondents are entitled.

Finally, as both the District Court and the Court of Appeals have factually determined and held, *The Post* has *not* gone out of business. It has merely consolidated its printing facilities with *The Cincinnati Enquirer*. Thus, the Petitioner's misdirected authority is not even factually pertinent to this case. As stated by Circuit Judge Merritt:

> But as the District Court concluded, the Post has not in any meaningful sense gone out of business. It is still being published; it is still producing revenue. If it had gone completely out of business, all parties involved in the organization – shareholders, managerial officers, editorial employees, and printing employees – would have borne some loss. By closing down its printing operations without compensating plaintiffs, Scripps has sought to force them to bear a disproportionate share of the losses caused by the Post's financial difficulties.

Petition, App. B at 15a-16a.

CONCLUSION

The Petitioner spins a web of obfuscation in its attempt to fabricate federal issues of sufficient magnitude to justify a grant of Certiorari. In truth, the only federal policy which overshadows this case is that which favors the enforcement of labor contracts.[14] That policy is neither new nor unsettled and, moreover, the Court of Appeals' decision is entirely consistent with it.

The Respondents urge this Court to deny the Petition for Certiorari expeditiously so they may return to the District Court at the earliest feasible time to obtain the damages to which the Court of Appeals has ruled they are entitled, and for which they have already waited far too long.

Respectfully submitted,

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[14] The purpose and policy behind Section 301 was addressed by this Court in *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957). This Court recognized that Section 301 implements a federal policy that collectively bargained agreements negotiated and agreed to by the parties may be enforced through resort to the federal judicial process thereby promoting industrial harmony.